Judge Davis, March 17th

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152

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~416.~~ 181

WILLIAM W. GODDARD, PLAINTIFF IN ERROR,

VS.

GEORGE J. FOSTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 27, 1871.

[illegible] 1872

Page 13 & 14

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Filed Sept. 15, 1871.

The within writ is allowed, & pl'ff in error having given the requisite security, it is ordered that all proceedings on the within-mentioned judgment be stayed until the rendition of judgment by the Supreme Court.

Sept., 1871.

1 Circuit court of the United States for the southern district of New York.

Pleas before the judge of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court-rooms in the city of New York, of the October term, 1870, to wit, the 17th day of October, 1870. Witness the Honorable Samuel Blatchford, judge of the said court.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 14th day of August, 1862, William W. Goddard, defendant, was summoned to answer the complaint of George J. Foster, plaintiff, in the court of common pleas for the city and county of New York, and such proceedings (which are more fully recited in the declaration hereinafter set forth) were thereupon had that an order was made by said court of common pleas removing said action to this court, to be proceeded in as if brought here by original process, according to the act of Congress in such case made and provided.

And thereupon, and on the 30th day of December, 1865, in the October term, 1865, of the circuit court of the United States of America, for the southern district of New York, in the second circuit, 2 held at the United States court-rooms in the city of New York, in the said district, before the judge of the said court, came George J. Foster, by Emerson & Pritchard, his attorneys, and brought then and there into said court, before the judge thereof, his certain declaration against William W. Goddard, the defendant, of a plea of trespass on the case upon promises, which declaration follows in these words, that is to say:

SOUTHERN DISTRICT OF NEW YORK, *to wit:*

William W. Goddard, the defendant, was summoned to answer the complaint of George J. Foster, plaintiff, in the court of common pleas for the city and county of New York, for the sum of twenty-five thousand dollars, with interest from the first day of March, in the year 1858, by summons personally served upon said Goddard, at the city of New York, in the State of New York, on the 14th day of August, in the year eighteen hundred and sixty-two, whereby an action was commenced in the said court of common pleas, according to the laws of the State of New York, and the rules and practice of said court, in favor of and in the name of said plaintiff, against the said defendant, upon and for the same cause of action hereinafter set forth, and the said 3 summons was filed in the office of the clerk of the said court, and the said defendant afterwards duly appeared in said action, by his attorney, and, it being made to appear to the said court of common pleas, upon the petition of said defendant, that the action so commenced as aforesaid should be removed to this court, and that said defendant was a citizen of the State of Massachusetts, and that said plaintiff was a citizen of the State of New York, and upon compliance with the statute of the United States in that regard, it was ordered by the said court of common pleas that said court would proceed no further in said action, and that the same should be removed to this court to be proceeded in as if brought here by original process, according to the act of Congress in such case made and provided, and the clerk of said court of common pleas did thereupon file the said summons and all the proceedings thereupon in this court, according to the course and practice of this court.

Wherefore, let the further proceedings and trial in this action against the said defendant be continued in this court.

And thereupon the said George J. Foster, plaintiff in this suit, who is a citizen of the State of New York, by Emerson & Pritchard, his attorneys, complains of the said William W. Goddard, who is a citizen of the State of Massachusetts, defendant in this suit, of a plea of
4 trespass on the case.

For that, whereas, heretofore, to wit, on the 21st day of August, in the year 1850, at Boston, to wit, at the southern district of New York aforesaid, in consideration that said plaintiff, who was then residing at Valparaiso, on the west coast of South America, should and would, at the special instance and request of said defendant, take charge of and manage the business of said defendant on that coast in respect of the voyage hereinafter next specified, that is to say, the sale and purchase in that business of merchandise and other property, collecting freight-moneys therein, procuring freights and consignments of goods therein, eliciting orders for the purchase and shipment of property therein, investing money, drawing and negociating bills of exchange in reference thereto, and forwarding all information that could be obtained by said plaintiff respecting the same, and transacting all business that might be required of said plaintiff by said defendant in connection with said voyage, in accordance with said defendant's instructions and best interests, and should and would care for and protect the said defendant's interests in that behalf from impositions, unjust charges, and extravagant expenditures of ship-masters to the best of said plaintiff's ability, and should and would become and be liable to the
5 full extent of his interest and means for all the losses that might be incurred in the business of said voyage, as also for all the risks and casualties attendant thereon, that is to say, to the full extent of one-quarter part thereof, he, the said defendant undertook, and then and there faithfully promised the said plaintiff to pay to him, said plaintiff, upon the completion of the said voyage, one-fourth part of the net profits of said voyage, and that in computing the said net profits, interest on the capital furnished therefor by said defendant, and all costs and expenses of whatever nature that should be incurred both at home and abroad in prosecuting the business of said voyage, including the expense of sailing and keeping in repair the vessel employed, together with the port charges, should be reckoned among and deducted as expenses, and the said agreement, being so made as aforesaid, afterwards, to wit, on the day and year last aforesaid in consideration thereof, and that the said plaintiff at the special instance and request of the said defendant had then and there undertaken, and faithfully promised the said defendant to perform and fulfill said agreement in all things on the said plaintiff's part and behalf to be performed and fulfilled, he, the said defendant, undertook and then and there faithfully promised the said plaintiff to perform and fulfill the said agree-

6 ment in all things on said defendant's part and behalf to be performed and fulfilled.

And the said plaintiff avers that, afterwards, to wit, on the day and year last aforesaid, at the place aforesaid, under the agreement hereinbefore set forth and in pursuance thereof, the said defendant fitted out and dispatched from said Boston, and sent and consigned to the said plaintiff at Valparaiso aforesaid, as the said defendant's agent, a certain ship or vessel called the Harriet Erving, having on board a large and valuable cargo of merchandize to be sold on the west coast of South America, and for the purpose of being loaded there, by and under the direction of said plaintiff, with a large and valuable cargo of South American products and other merchandise for her return to Boston aforesaid; that the said voyage of the ship Harriet Erving was the same voyage referred to in the aforesaid agreement, and to which said agreement applied; that said plaintiff, as agent for said defendant as aforesaid, managed the whole business thereof upon the said west coast, in pursuance of said agreement and of the express requests and instructions which said defendant, from time to time, made or gave to said plaintiff; that said ship arrived at Valparaiso aforesaid with her said cargo upon said voyage on or about the 8th day of December, in
the year 1850; that said plaintiff had, before such arrival of said
7 ship, pursuant to said agreement and the instructions of said
defendant, caused to be purchased a homeward cargo for her of great value, to wit, the amount and value of $150,000 and upwards, and had the same ready for shipment in her with the least possible delay; that afterwards, to wit, on the 27th day of said December, the said plaintiff sent, dispatched, and consigned the said ship and her said return cargo from said Valparaiso upon said voyage to the said defendant at said Boston; that immediately after such arrival at Valparaiso aforesaid, said plaintiff proceeded in pursuance of said agreement to cause to be sold, and thereafter caused to be sold, the outward cargo of said ship for a large amount of money, to wit, the sum of $250,000; and that said plaintiff transacted any and all business relating to said voyage required of the said plaintiff by the said defendant, and in accordance with the instructions and best interests of said defendant, and that said plaintiff did care for and protect in that behalf from impositions, unjust charges, and extravigant expenditures of ship-masters, to the best of said plaintiff's ability, the interests of said defendant, and that the said plaintiff did become liable to the full extent of his interest and means for all the losses that might be incurred in the business of said voyage, and for all risks and casualties attendant thereon,
that is to say, to the full extent of one-quarter part thereof; and
8 that the said plaintiff well and faithfully fulfilled and performed
all duties incumbent upon him by means of the aforesaid agreement between said plaintiff and said defendant; and the said voyage made under and in pursuance thereof, and all things to be performed and fulfilled by the said plaintiff under said agreement.

And said plaintiff further avers that said voyage has been fully completed, and that there was a large net profit upon the business of said voyage, after making all the deductions required by said agreement to be made; and that said profit amounted to a large sum of money, to wit, the sum of $94,401.88, including interest to the first day of March, 1858, to which date the accounts thereof were made up; and that by means of the premises said defendant is indebted to said plaintiff in one-fourth part of said profits, said fourth part being a large sum of money, to wit, $23,600.44, with interest from the said first day of March,

1858, and *and* being so indebted the said defendant in consideration thereof, afterwards, to wit, on the second day of March, in the year 1858, at the city of New York, in the southern district of New York
aforesaid, undertook and promised said plaintiff to pay him the
9 said sum of money and interest, when he, the said defendant,
should be thereunto afterwards requested.

And whereas, also, heretofore, to wit, on the second day of August, in the year 1850, at Boston aforesaid, to wit, at the southern district of New York aforesaid, in consideration that said plaintiff, who was then residing at Valparaiso, on the west coast of South America, should and would, at the special instance and request of said defendant, take charge of and manage the business of said defendant on that coast in respect to a certain other voyage hereinafter next specified, that is to say, the sale and purchase in that business of merchandize and other property, collecting freight-moneys therein, procuring freights and consignments of goods therein, eliciting orders for the purchase and shipment of property therein, investing money, drawing and negociating bills of exchange in reference thereto, and forwarding all information that could be obtained by said plaintiff respecting the same, and transacting all business that might be required of said plaintiff by said defendant in connection with said voyage, in accordance with said defendant's instructions and best interests, and should and would care for and protect the said defendant in that behalf from impositions, unjust charges, and extravagant
expenditures of ship-masters, to the best of said plaintiff's
10 ability, he, the said defendant, undertook, and then and there
faithfully promised the said plaintiff to pay him, the said plaintiff, upon the completion of the said voyage, a reasonable compensation for his, the said plaintiff's, services in that behalf. And the said agreement being so made as aforesaid, afterwards, to wit, on the day and year last aforesaid, in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to perform and fulfill the said agreement in all things on the said plaintiff's part and behalf to be performed and fulfilled, he, the said defendant, undertook and then and there faithfully promised the said plaintiff to perform and fulfill the said agreement in all things on the said defendant's part and behalf to be performed and fulfilled.

And the said plaintiff avers that afterwards, to wit, on the day and year last aforesaid, at the place aforesaid, under the agreement hereinbefore set forth and in pursuance thereof, the said defendant fitted out and despatched from said Boston, and sent and consigned to the said plaintiff at said Valparaiso, as the said defendant's agent, a certain
other ship or vessel called the Harriet Erving, having on board a
11 large and valuable cargo of merchandise to be sold on the
west coast of South America, and for the purpose of being loaded there, by and under the direction of said plaintiff, with a large and valuable cargo of South American products or other merchandise for her return to Boston aforesaid; that the said voyage of the ship Harriet Erving last aforesaid, was the same voyage referred to in the agreement last aforesaid, and to which said agreement applied; that said plaintiff, as agent for said defendant as aforesaid, managed the whole business thereof upon the said west coast in pursuance of said agreement, and of the express requests and instructions which said defendant, from time to time, made and gave to said plaintiff; that said ship arrived at said Valparaiso with her said cargo upon said voyage on or about the 8th day of December, 1850; that said plaintiff had, before

such arrival of said ship, pursuant to said agreement and the instructions of said defendant, caused to be purchased a homeward cargo for her of great value, to wit, the amount and value of $150,000 and upwards, and had the same ready for shipment in her with the least possible delay; that afterwards, to wit, on the 27th day of said December, the said plaintiff sent, dispatched, and consigned the said ship and her said return cargo from said Valparaiso, upon said voyage to the
12 said defendant at said Boston; that immediately after such arrival at said Valparaiso, said plaintiff proceeded, in pursuance of said agreement, to cause to be sold, and thereafter caused to be sold the outward cargo of said ship for a large amount of money, to wit: the sum of $250,000, and that said plaintiff transacted any and all business relating to said voyage required of the said plaintiff by the said defendant, and in accordance with the instructions and best interests of said defendant, and that the said plaintiff did care for and protect the interests of said defendant in that behalf from impositions, unjust charges, and extravagant expenditures of ship-masters, to the best of said plaintiff's ability, and faithfully fulfilled and performed all duties incumbent upon him, by means of the aforesaid agreement between said plaintiff and said defendant, and in respect of the said voyage made under and in pursuance thereof, and all things to be performed and fulfilled by the said plaintiff under said agreement.

And the said plaintiff saith that said last-named voyage has been fully completed, and that the services of the said plaintiff in that behalf were reasonably worth the further sum of $50,000, which sum the said plaintiff was well entitled to have of the said defendant; all of
13 which the said defendant afterwards, to wit, at the day and year last aforesaid, there had notice, and that by reason of the premises the said defendant is justly indebted to the said plaintiff in said sum of $50,000 with interest from the first day of January, 1851, and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the second day of March, in the year 1858, at the city of New York, in the southern district of New York aforesaid, undertook and promised said plaintiff to pay him the said sum of money and interest, when he, the said defendant, should be thereunto afterwards requested.

And whereas, also heretofore, to wit, on the 13th day of April, in the year 1850, at Boston aforesaid, to wit, at the southern district of New York aforesaid, and in consideration that the said plaintiff, who was then residing at said Valparaiso, on the west coast of South America, should and would, at the special instance and request of the said defendant, take charge of and manage the business of the said defendant on said coast in respect of such voyage or voyages as the said defendant, who was then a merchant at Boston, aforesaid, should thereafter and until the 31st day of December next thereafter, commence, prosecute, and undertake, that is to say, the sale and purchase in that business of merchandize and other property, collecting freight-moneys therein, procuring freights and consignments of goods therein, eliciting
14 orders for the purchase and shipment of property therein, investing money, drawing and negociating bills of exchange in reference thereto, and forwarding all information that could be obtained by the said plaintiff respecting the same, and transacting all business that might be required of said plaintiff by said defendant, in connection with said voyage or voyages, in accordance with said defendant's instructions and best interests, and should and would care for and protect the said defendant's interests in that behalf from impositions, unjust charges, and extravagant expenditures of ship-masters, to the best

of said plaintiff's ability, he, the said defendant, undertook and then and there faithfully promised the said plaintiff to pay to him, the said plaintiff, a reasonable compensation for his, the said plaintiff's, services in that behalf; and the said agreement being so made as aforesaid, afterwards, to wit, on the day and year last aforesaid, in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to perform and fulfill the said agreement in all things on said plaintiff's part and behalf to be performed and fulfilled, he, the said defendant, undertook, and then and there faithfully promised the
said plaintiff to perform and fulfill the said agreement in all things
15 on said defendant's part and behalf to be performed and fulfilled;
that afterwards, and before the 31st day of December aforesaid, to wit, on or about the 21st day of August, in the year last aforesaid, the said defendant did commence a certain other voyage, and on or about said last-named day did send and despatch a certain other ship or vessel named the Harriet Erving, having on board a large and valuable cargo of merchandize, from Boston aforesaid, and sent and consigned the said last-named cargo on board said ship to the said plaintiff at Valparaiso, to be there received by him, the said plaintiff, as the agent of the said defendant, to be sold on said west coast of South America, and the said ship to be at said west coast loaded with a return cargo of South American products and other merchandize by and under the direction of said plaintiff to be carried in the said last-named ship to the said Boston; that said last-named voyage, so commenced as aforesaid, was thereafter prosecuted by the said defendant, and was the same voyage or one of the voyages referred to in the last-named agreement; that said plaintiff, as agent of the said defendant as aforesaid, managed the whole business thereof upon said west coast until the said 31st day of December, in pursuance of the agreement last aforesaid, and of the express requests and instructions which the said defendant, from time
to time, made or gave to said plaintiff; that said ship last afore-
16 said with her said cargo arrived at said Valparaiso upon said
voyage, before said 31st day of December, to wit, on the 8th day of said December; that the said plaintiff had, before said arrival of said ship, pursuant to said agreement last aforesaid, and the instructions of the said defendant, caused to be purchased a return cargo for her of great value, to wit, of the value of $150,000, and had the same ready for shipment in her with the least possible delay, and caused said last-named cargo to be shipped on board said ship; and afterwards, to wit, on the 27th of said December, sent, despatched, and consigned said ship and said return cargo to said defendant to said Boston upon said voyage, and that immediately after the arrival of said ship at said Valparaiso, the said plaintiff proceeded, in accordance with said agreement and the instructions of said defendant, to cause the said cargo so brought to said Valparaiso as aforesaid, to be sold, and thereafter, by or before the said 31st day of December, caused to be sold a large part of said last named cargo for a large sum of money, to wit, the sum of $95,000, and the remainder thereof was before said last-named day placed by the said plaintiff in the hands and possession of the mercantile house of Alsop & Co., in accordance with the instructions of said defendant; and that the
said plaintiff, until said 31st day of December, transacted any and
17 all business relating to said voyage required of the said plain-
tiff by the said defendant, and in accordance with the said defendant's instructions and best interests; and that the said plaintiff, until said 31st day of December, did care for and protect the interests

of the said defendant in that behalf from all impositions, unjust charges, and extravagant expenditures of ship-masters, to the best of said plaintiff's ability; and that the said plaintiff faithfully fulfilled and performed all things to be performed and fulfilled by him, the said plaintiff, under (said agreement,) and the said plaintiff saith that the services of him, said plaintiff, in that behalf, were reasonably worth the further sum of $50,000, which sum the said plaintiff was well entitled to have of the said defendant; of all which the said defendant afterwards, to wit, on the 1st day of January, in the year 1851, then had notice, and by reason of the premises the said defendant is justly indebted to the said plaintiff in the said sum of $50,000, with interest thereon from the first day of January last aforesaid, and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the 2d day of March, in the year 1858, at the city of New York, in the southern district of New York aforesaid, undertook and faithfully promised the said plaintiff to pay him, the said plaintiff, the said sum of money and interest when he, the said defendant, should be thereunto afterwards requested.

And whereas, also the said defendant, afterwards, to wit, on
18 the day and year last aforesaid, at the southern district of New
York aforesaid, was indebted to the said plaintiff in the further sum of fifty thousand dollars lawful money of the United States, for the work and labor, care and diligence, journeys and attendance of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed for and as the agent of the said defendant and on his retainer, and for certain commission and reward due and of right payable from said defendant to said plaintiff in respect thereof, and being so indebted he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the southern district of New York aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also afterwards, to wit, on the day and year last aforesaid, at the southern district of New York aforesaid, in consideration that said plaintiff, at the like special instance and request of said defendant, had before that time done, performed and bestowed other, his work and labor, care and diligence, journeys, and attendances, as the factor and agent of the said defendant, and in and about the selling and disposing of divers goods, merchandise, and chattels, and in and about other the business of said defendant, and for said
19 defendant, he, the said defendant, undertook and then and there
faithfully promised said plaintiff to pay him so much money as he therefor reasonably deserved to have of said defendant, when he, the said defendant, should be thereunto afterwards requested.

And said plaintiff avers that he therefor reasonably deserved to have of said defendant the further sum of fifty thousand dollars, lawful money of the United States, to wit, at the southern district of New York aforesaid, whereof the said defendant afterwards, to wit, on the day and year last aforesaid there had notice.

Nevertheless the said defendant, not regarding his said several promises and undertakings, but contriving and intending to defraud the said plaintiff in this behalf, hath not paid the said several sums of money or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do, but the said defendant to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of fifty thousand dollars; and therefore he brings his suit, &c.

EMERSON & PRITCHARD,
Attorneys for Plaintiff.

20 And the said William W. Goddard by George De Forest Lord, his attorney, comes and defends the wrong and injury when, &c., and says, that he did not undertake or promise in manner and form as the said George J. Foster hath thereof complained, and of this he puts himself upon the country, &c.

GEORGE DE FOREST LORD,
Att'y for Def't.

The defendant, by his attorney aforesaid, hereby gives notice that, under the pleas above pleaded, he will give in evidence as matters of defence—

That all the supposed services rendered by the plaintiff, as alleged in the declaration, were rendered, if at all, in conformity with a written contract, bearing date the seventh day of May, 1849, whereby plaintiff engaged to perform such services, and was to receive as compensation a certain sum therein mentioned for the expense of his living at Valparaiso, and one-fourth part of the nett profits of plaintiff's business in that trade which said Foster should have conducted to completion; a true copy of which is hereunto annexed.

And that afterwards, on the first day of May, 1857, the plaintiff
21 filed a bill of complaint against the defendant in the circuit court of the United States for the first circuit, setting forth, amongst other things, the agreement herein above mentioned, and the services rendered by him under said agreement, and claiming as relief, amongst other things, that an account might be taken of the dealings and transactions under the same between him and the defendant herein, and that the defendant in this action might be decreed to pay to the said plaintiff, what, upon taking said account, might appear to be due him, and that said plaintiff might have such other or further relief as he might be entitled to in the premises.

That this defendant regularly appeared and answered the said bill of complaint. And an account was taken as in said bill of complaint was demanded, and upon such accounting a balance was found due by this defendant to the said plaintiff, and on the day of the said plaintiff entered judgment against this defendant for the amount due him, and the defendant will claim and insist that by said action and judgment the plaintiff is barred and precluded from having or maintaining this action.

The defendant will show also that the plaintiff cannot have or maintain the said action, because none of the causes of action accrued within six years before the commencement thereof.

22 GEORGE DE FOREST LORD,
Def'ts Att'y.

This memorandum of an agreement, entered into this seventh day of May, 1849, by and between W'm W. Goddard, on the one part, and George J. Foster, both of Boston, on the other part, witnesseth:

That said Foster engaged to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and California, exclusively to the management of all said Goddard's business in those countries, such as sale and purchase and sale of merchandize, and any other property, collecting freight-moneys, procuring freights and consignments of goods, eliciting orders for the purchase and shipment of property, investing money, drawing and negociating bills of exchange, and forwarding all the information that can be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard in accordance with his instructions and best interests, which he is also to care for and protect from impositions, unjust charges, and also extravagant expenditures of the ship-masters, to the best of his ability.

23 In consideration for which said Goddard engages that said Foster shall, on his return, be entitled to one-fourth part of the nett profits of his business in that trade that he (said Foster) shall have conducted to completion, after deducting interest on the capital furnished by said Goddard, as also all costs and expenses of whatever nature that may be incurred, both at home and abroad, in prosecuting the business, including the expense of sailing and keeping in repair the vessels employed, together with the port charges, as also the cost of said Foster's living, which is not to exceed one thousand dollars per annum; and, furthermore, said Goddard has the right of purchasing, chartering, freighting, and selling the vessels designated for the trade, at his option, the profit or loss attendant thereon to be charged or credited in general account. The vessels now designated for the trade, are the ships "Crusader" and "Harriet Erving," which are to be charged in account, the former at the value that may be agreed upon between W'm W. Goddard and Samuel Goddard in settlement of their account, and the latter at the cost of construction and equipment when new, abating nothing for the use of the ship for her present and first voyage.

It is understood that said Foster is to leave in the hands of said Goddard, bearing interest, what funds he may have, less two thousand dollars, to be paid him before leaving this country, and that 24 neither the same or any portion of his profits shall be abstracted until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any time by giving said Goddard so much notice that any voyage he may have commenced previous to receipt of such advice shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise. It is also understood that said Goddard has the right to annul this agreement whenever he may choose to do so; and, furthermore, that said Foster is liable to the full extent of his interest and means for all the losses that may be made in this business, as also for all the risks and casualties attendant thereon. Said Foster is hereby authorized to call to account and to displace any and all masters of vessels that may be sent out by said Goddard, and to replace them with others, should he find it expedient so to do.

The words, "interest and means" interlined before signing.

W'M W. GODDARD. [AND SEAL.]
GEO. J. FOSTER. [AND SEAL.]

In presence of—
CH'S W. FOSTER.

25 Therefore the issue above joined is ordered by the said court to be tried at the term of said court, appointed to be held at the city of New York, on the third Monday of October, 1870.

And now, on this day, to wit, the 15th day of December, 1870, being as yet of the October term, 1870, before the said judge, at the United States court-rooms in the city of New York, come the said George J.

Foster, by his attorney aforesaid, as well as the above-named defendant, by his attorney aforesaid, and the jurors of the jury summoned to try the said issues being called, also came, who, to speak the truth of the matters aforesaid, were chosen, tried, and sworn, and to prove the said issues, testimony was offered by both plaintiff and defendant, and certain exceptions were taken on the part of said defendant to rulings of the court, all of which appear in a bill of exceptions, to which the said circuit judge has set his seal, and which is hereto annexed as part of this record; and the said jurors say, upon their oath, that the said defendant did undertake and promise in manner and form, as the said plaintiff hath above thereof complained against him, and they assess the damages of the said plaintiff, by reason of the premises, at the sum of twenty-nine thousand four hundred and seven dollars and thirty-seven cents over and above his costs and charges by him about 26 his suit in his behalf expended, and for those costs and charges the sum of sixteen hundred and eighty-four dollars and forty-two cents.

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages, costs, and charges by the jurors aforesaid in form aforesaid assessed, and also his costs and charges by the court here adjudged of increase to the said plaintiff, and with his assent, which said damages, costs, and charges, in the whole, amount to thirty-one thousand and ninety-one dollars and seventy-nine cents (\$31,091$\frac{79}{100}$.)

Judgment signed this fifteenth day of September, 1871.

R. E. STILWELL,
Deputy Clerk.

27 Circuit court of the United States for the southern district of New York.

GEORGE J. FOSTER
against
WILLIAM W. GODDARD.

And afterwards, to wit, on the 19th day of December, 1870, the issues joined between the said parties came on to be tried, at a term of said court, held by the Honorable Samuel Blatchford, district judge, thereto specially appointed, and a jury duly impanelled and sworn, and upon said trial the counsel of the plaintiff, in order to prove the issues on his part, gave in evidence—

A stipulation dated 17th May, 1867, permitting either party to read in evidence the proceedings, testimony, and papers in an action by the same plaintiff against the same defendant in the United States circuit court for Massachusetts, and printed in the appeal-book in said action, so far as the same were competent in the action now pending; plaintiff's counsel then read from said appeal-book an agreement between the said plaintiff and defendant as follows: This memorandum of agreement entered into this 24th day of June, 1843, by and between William W. Goddard, of the one part, and George J. Foster, both of Boston, on the other part, witnesseth—

28 That said Foster engages to proceed at once in the ship Robin Hood direct to Valparaiso, and that he will there remain for the term of five years, and devote himself for the whole time exclusively to the management of said Goddard's business, such as the sale and purchase of cargoes, collecting freight-moneys, procuring return freights,

eliciting orders for the purchase and shipment of goods for the coast, effecting the sale of vessels when wished, and collecting and forwarding all the information that may be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard in strict accordance with his instructions, whose interest he is to care for and protect from frauds, impositions, false and unjust charges, and also extravagant expenditures of the ship-masters, to the best of his ability; he is also to give to each vessel the greatest possible dispatch that may be consistent with the owner's interest.

In consideration of which said Goddard engages that said Foster shall, at the expiration of five years, be entitled to one-tenth of the net profits of his business in that trade after deducting interest at the rate of six per cent. per annum on the capital invested, and all costs
29 and expenses of whatever name and nature that may be incurred both at home and abroad, in sailing, victualling, manning, and keeping in repair the vessels employed, included all port charges as also the actual expenses that may appertain to the goods themselves, including the cost of said Foster's living, which is not to exceed six hundred dollars per annum; and, furthermore, said Goddard has the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit attending thereon to be charged or credited in the general account. The vessels now designed for the trade are the ship Robin Hood and bark Roscius, and are valued, the Robin Hood, at ten thousand five hundred dollars, cash, at the completion of her last voyage; and the Roscius, at eight thousand dollars, cash, on the completion of her present voyage. It is also understood that said Foster's interest of one tenth is liable to the full extent for all the risks and casualties in the business attendant upon the goods and vessels.

It is furthermore agreed that said Foster shall be entitled to a compensation of one thousand dollars per annum in view of his share of the profits, should it fall short of that amount; it is understood, nowever, that this is not in addition to his share of the profits and that the
30 profits of the business are not to be abstracted until the expiration of the five years agreed upon.

Said Foster is also hereby authorized to call to account and to displace any and all masters of vessels that may be sent out by said Goddard and replace them with others, should he find it expedient so to do.

In witness whereof we have hereunto set our hands and seals.

GEO. J. FOSTER. [SEAL.]
WILLIAM W. GODDARD. [SEAL.]

Signatures acknowledged in presence of—
THOE. MATCHELL

Plaintiff's counsel also read from said book the following agreement between the same parties:

Agreement with George J. Foster, May 7, 1849.

This memorandum of an agreement entered into this seventh day of May, 1849, by and between William W. Goddard, on the one part, and George J. Foster, both of Boston, on the other part, witnesseth:

That said Foster engages to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and in California, exclusively to the management of said

Goddard's business in those countries, such as the sale and pur-
31 chase of merchandize, and any other property, collecting freight-
moneys, procuring freights and consignment of goods, eliciting
orders for the purchase and shipment of property, investing money
drawing and negociating bills of exchange and forwarding all the in-,
formation that can be obtained respecting the trade; in fine, to transact
any and all business that may be required of him by said Goddard, in
accordance with his instructions and best interests, which he is also to
care for and protect from impositions, unjust charges, and also extrava-
gant expenditures of the ship-masters, to the best of his ability.

In consideration of which said Goddard engages that said Foster
shall, on his return, be entitled to one-fourth part of the net profits of
his business in that trade, that he (said Foster) shall have conducted to
completion, after deducting interest on the capital furnished by said
Goddard, as also all costs and expenses of whatever nature that may
be incurred, both at home and abroad, in prosecuting the business, in-
cluding the expense of sailing and keeping in repair the vessels em-
ployed, together with the port-charges, as also the cost of said Foster's
living, which is not to exceed one thousand dollars per annum; and,
furthermore, said Goddard has the right of purchasing, charter-
32 ing, freighting, and selling the vessels designed for the trade at
his option, the profits or loss attendant thereon to be charged
or credited in general account. The vessels now designed for the trade
are the ships Crusader and Harriet Erving, which are to be charged in
account, the former at the value that may be agreed upon between
William W. Goddard and Samuel Goddard in settlement of their ac-
count, and the latter at the cost of construction and equipment when
new, abating nothing for the use of the ship for her present and first
voyage.

It is understood that said Foster is to leave in hands of said God-
dard, bearing interest, whatever funds he may have, less two thousand
dollars to be paid him before leaving this country, and that neither the
said or any portion of his profits shall be abstracted until he shall see
fit to withdraw from the present arrangement, which he is at liberty to
do at any time, by giving said Goddard so much notice that any voyage
he may have commenced previous to receipt of such advice, shall re-
ceive the full benefit of all said Foster's services to its final accomplish-
ment, and not otherwise. It is also understood that said Goddard has
the right to annul this agreement whenever he may choose so to do; and,
furthermore, the said Foster is liable to the full extent of his interest
and means for all the losses that may be made in this business, as
33 also for all the risks and casualties attendant thereon.

Said Foster is hereby authorized to call to account and to displace any and all masters of vessels that may be sent out by said Goddard and to replace them with others, should he find it expedient so to do.

The words "of his interest and means" interlined before signing.

GEORGE J. FOSTER. [SEAL.]
WILLIAM W. GODDARD. [SEAL.]

In presence of—
CHARLES W. FOSTER.

Plaintiff's counsel reads from said book the following extracts of etters:

Foster to Goddard, February 22, 1850.

"After a great deal of reflection on the subject, I have concluded to join the house of Messrs. Alsop & Co., on the 1st of January, 1851. I will manage your business as usual, until the 31 of December, which will afford you ample time to make your arrangements for sending some one out, if you be inclined. I advise your having an agent on the coast, as frequent suggestions can be made, of which he can take advantage, when a member of a house cannot take any general responsibility. If, however, you should send no one, your instructions should be discretionary as before; most constituents send positive orders, and in this respect you have always held an advantage. I shall always take
34 great interest in your affairs, and you may depend upon my assisting any agent you may have here, to the utmost of my abilities.

"Now, with regard to myself, I desire an account, as I wish to put every dollar I may have into the concern. It will not be difficult for you to agree upon an amount, which shall be nearly correct, upon the receipt of this letter. As this is a matter of the greatest importance to me, I am certain you will exert yourself to meet my views. After our long and satisfactory connection together, I must say that I leave it with many regrets, and I doubt not but the feeling is mutual. The truth is, however, that the connection to a certain extent will still exist. But, by the articles of this house, no active partner can have any interest out of the establishment, and they are bound down in the most particular manner. I shall therefore, by return steamer, look for something decisive from you, upon what I have written above, as you will see at once the necessities of my position. The arrangement can be made at once by drawing upon you, which probably would be the directest and at the same time the most economical manner."

Goddard to Foster, Feb'y 27, 1850.

"The Crusader sailed this morning. The Crusader and Erving will be so near together that I shall probably send a third vessel in
35 July."

Goddard to Foster, March 27, 1850.

"Indeed, I think the Erving's will be the next cargo sent, as the Corsair, the only vessel I know of, to interfere, will probably be sold."

Goddard to Foster, March 29, 1850.

"Of course I am now expecting the Erving in a few days, which vessel will be returned to you at once to make room for a third ship in July; and with the advantage of our presses, I shall expect an immence quantity of wool this year."

Goddard to Foster, April 13, 1850.

"I am very glad to learn your decision to join the house, it being what I would have advised for your own interest. Your wishes will be complied with as speedily as possible."

Goddard to Foster, May 11, 1850.

"The Erving is a very sharp ship. I do not make this statement because I want the Erving & Crusader loaded to 22 feet, for you know I prefer to have our vessels in trim to make good passages.

"P. S.—I feel that our presses will enable you to send immense quantities of wool, to great advantage, by our own vessels, as also on freight by other vessels."

Foster to Goddard, May 29, 1850.

"I am much obliged for your kind expressions as to my joining the house. It is advantageous in point of position, but as to emolu-
36 ment I have concluded that it would have been quite as much for
my interest to have remained with yourself. * * * I did not expect you would be able to show me whether you intended sending Mr. Erving immediately or not.

"Be that as it may, you may rely, with safety, upon my exertions and interest in your favor as much as ever, and also as if you had an agent upon the spot. As to my account, I am obliged to you for your readiness, as it is of all importance in my arrangements here with Messrs. Alsop & Co."

Foster to Goddard, June 29, 1850.

"In connection with the above, allow me to request that in case you send no one out here, I wish you to send me in writing, formal, discretionary orders with regard to operations."

Goddard to Foster, July 30, 1850.

"I wish to advise that the Erving will sail in 15 or 20 days, commanded by Capt. Spavin, and good as new. She will take out, say 1,000 bales ¾, and other articles so near your mem. of May 29 as expedient."

Plaintiff's counsel offers in evidence letter from Goddard to Capt. Robert Spavin, dated August 19, 1850.

(Objected to by defendant's counsel on the ground that it is a letter to a third party; objection overruled; defendant's counsel excepts.)

37 Plaintiff's counsel proceeds to read the letter as follows:

"Having appointed you to the command of my ship, Harriet Erving, I wish you to proceed in her with all possible dispatch direct to Valparaiso, where my agent, Mr. George J. Foster, or, in his absence, Messrs. Alsop & Co., will dispose of your outward cargo, provide for the wants, and direct your further movements."

Plaintiff's counsel also read from said book extracts of letters, as follows:

Goddard to Foster, August 20, 1850.

"I have to advise you that the Erving will sail to-morrow, Spavin, master, with a full cargo and four passengers, for Valparaiso. Notwithstanding many of these goods are of high cost, nearly the whole of them have advanced considerably since purchased—cotton goods so much so that I shall retain the 560 bales shirtings for the Crusader rather than save the interest by returning them."

Foster to Goddard, August 28, 1850.

"And only hear by Mr. Bartlett's letters that the Erving was loading on the 5 of July. I am also very glad to hear from Mr. Hobson that you intend sending Mr. Erving out. I think it necessary, and will serve every way. I have set on foot your contracts for wool next season upon the same basis as last season, and hope to obtain large results.’

38 *Goddard to Foster, August* 31, 1850.

“The Erving was towed to sea on the 21st, drawing 17½ feet. Her cargo consists of (then follows list of cargo.) Copper—I have sold 200 M. lbs., to arrive, at 17½, 6 months. Goat-skins—I shall obtain 70 cents for all ours, if of good weight.”

Goddard to Foster, September 9, 1850.

“That the like may never happen again, should such a chance occur, I take this opportunity of expressing my desire that you will hereafter embrace all good opportunities by shipping our own merchandise, or purchasing of others, when it seems an object, as was understood between ourselves when last you were in the States. Copper—Hemenway has sold all his, to arrive, at 17 and 17¼ c’ts, and I have sold 300 M. lbs., to arrive, at 17½ c’ts. Wool—I shall get 14 c’ts for all ours.”

Goddard to Foster, October 11, 1850.

“I intend to keep the Crusader here but three weeks, if she arrives in safety, and hope you will give both ships very great dispatch, so as to be ahead once more.”

Goddard to Foster, November 11, 1850.

“My letter to Messrs. Alsop & Co., of this date, addressed to them—because you will doubtless have joined that house on or before the arrival of the Crusader—gives all the particulars regarding her present voyage.

39 “Mr. Erving will, probably, go out in the H. Erving, so that, until his arrival, I shall consider it a personal favor if you will advise me individually, as heretofore.

“I am especially desirous to oblige you in the matter relating to your connection with the house, and notwithstanding no portion of your capital should, by good right, be withdrawn until all the liabilities of our joint relations shall have ceased, I hereby authorize you to draw on Messrs. Alsop & Co., or on myself, at sixty or ninety days, as you may see fit, for the sum of ten thousand dollars, on account, the difference between us to be adjusted as soon as those risks can be terminated.”

Foster to Goddard, Dec. 25, 1850.

‘The Harriet Erving arrived here on the 8th, in 108 days passage, in fine order. The ship will have 800 quintals of copper, at about 14⅝ c., and some 80 quintals of old copper, at 13 c’ts; 4,000 quintals of wool, at 6½ c’ts; 300 quintals of Merino, at 11 c’ts; 1,000 quintals of Brazil-wool, at 18 *lbs.*; your goat-skins, at 40 c’ts. The ship will fill up entirely with wool, all of which will be pressed.”

Foster to Goddard, Dec. 27, 1850.

“Please find enclosed invoice and bill of lading of copper, Brazil-wood, wool, goat-skins, old copper, and also debenture certificates.”

40 Plaintiff's counsel offers to read letter from Foster to Captain Robert Spavin, dated December 27, 1850.

(Objected to on the ground that the letter was to a third party; objection overruled; defendant's counsel excepts.)

Plaintiff's counsel reads the letter:

"You will please proceed to Coquimbo and there receive from Mr. Branninger about 4,000 quintals of copper, and thence to Talcahuano, where you will forward your letters to Don José Galan, of Conception, and will take on board all the wool you can carry, recollecting to enclose one bill of lading to Mr. Goddard, or asking Galan to do so.

"In case of any trouble about men never delay the ship, but pay what is necessary and get ahead with voyage. I avail myself of this occasion of complimenting you upon your great dispatch here, and am certain it will be much appreciated by Mr. Goddard."

Plaintiff's counsel also reads extracts of letters as follows:

Foster to Goddard, January 3, 1851.

"The H. Erving sailed punctually on the 27 ult., being here only nineteen days, of which five days were lost in holidays. I enclose her papers. The wool invoice we shall forward as soon as we receive it from Talcahuano." 41

Foster to Goddard, January 25, 1851.

"I have your esteemed favor of Nov. 11, and am much obliged for the kind expressions therein contained. In anticipation of my account I had entered into compromises of $15,000, which sum I shall have taken up on the coast before this shall have reached you. I do not suppose it will be material to you and doubt not your acquiescence. I believe you are sufficiently aware that I have worked very hard in your employment and shall have your interest much at heart; still I am glad that you intend sending out Mr. Erving, for there are many advantages perpetually occurring which a house cannot embrace. I will pay him every attention, and suggest to him at all times anything that may occur for your interest. * * * I shall write you, from time to time, a private letter when I see that your interest requires it, but the berth I have taken is a very laborious one, and I have wished a thousand times that I was back with you. You have really no idea of it. It is not only the sales, but the great weight of correspondence attaches to it likewise. All correspondence with you will be managed by myself. Write occasionally as you have time."

42 *Goddard to Foster, Feb'y* 10, 1851.

"I received yesterday, Sunday, your much valued favors of 25 December and 3 of January last, and am gratified to learn the safe arrival of the Erving, as also greatly pleased with the dispatch you gave her. Your sales are good, and I hope the gunnies will be worked off at 18 cents."

Foster to Goddard, Feb'y 25, 1851.

"I have only time to write you a few lines privately, and, indeed, have not much to say. In correspondence from the house you will be abundantly found in information. I intentionally omit a list of cargo until next mail."

Goddard to Foster, March 27, 1851.

"Your own, as also Messrs. Alsop & Co.'s, esteemed favors of 16 and 25 of January, were duly received. I shall be greatly pleased to receive private advices from you very often. Mr. Erving will, undoubtedly, go out with Captain Spavin, whom I am now looking for daily. For the Erving's copper I shall get 17¾ and 18 c'ts; 16 cents for the coarse and 24 c'ts for the merino wool; our goat-skins, at 30 c'ts per lb., have given 75 c'ts each. The Chili skins averaged but $2\frac{42}{100}$ lbs., while the
43 Peruvian weighed over $2\frac{75}{100}$ lbs. The Chili skins, however, are
much the most valuable by the pound, as they contain no salt. I am selling our hats at $21 per dozen, and want no more."

Foster to Goddard, May 8, 1851.

"I write you a few lines which, perhaps, would be out of place in the correspondence of the house."

Foster to Goddard, May 17, 1851.

"We are not writing to the U. States by this opportunity, and I expect you to keep the knowledge of this letter entirely to yourself."

Plaintiff's counsel then put in evidence bill of lading on outward voyage of the Harriet Erving—3d voyage:

Shipped, in good order and condition, by William W. Goddard, on board the good ship called the Harriet Erving, whereof is master, now lying in the port of Boston and bound for Valparaiso, merchandise, as specified below and annexed, being marked and numbered as in the margin, and are to be delivered in like good order and condition at the aforesaid port of Valparaiso, unto George J. Foster, esq., (the danger of the seas only excepted,) or, in his absence, unto Messrs. Alsop & Co., or assigns, he or they paying freight for the said goods—nothing being owner's property.
cents per cubic foot and Boston wharfage, with primage and average accustomed.
44 In witness whereof the master of the said vessel hath affirmed
to 3 bills of lading—all of this tenor and date—one of which being accomplished the others to stand void.

Dated at Boston, Aug't 20, 1850.

(Memo. in margin.)

ROBERT SPAVIN.

Plaintiff's counsel also reads in evidence from said book two invoices of outward cargo of Harriet Erving, 3d voyage, dated Boston, Aug. 31, 1850, and containing:

Domestic goods (dry goods)	125, 652 28
General articles	53, 839 86
Total cost of outward invoices, including charges..	$179, 492 14

Also invoices of the homeward cargo of the Harriet Erving, 3d voyage:

Invoice of sundries shipped by Alsop & Co., on board the ship Harriet Erving, Spavin, master, bound for Boston, for account of and consigned to William W. Goddard, esq., dated Valparaiso, Dec'r 27, 1850, containing 8,049 quintals of copper, at cost, (including charges)	118,644 ½
936 quintals of Brazil wood	2,249 3
950 " " " wool	7,448 1
6,749 goat-skins	2,870 4
	131,162 14

45 Also, invoice wool shipped by Alsop & Co., in Talcahauno, by order of Geo. J. Foster, on board ship Harriet Erving, 3rd voyage, bound to Boston, and consigned to W. W. Goddard, esq., for his account and risk, dated 17 Feb'y, 1851, and containing—

3,605 quintals of wool at cost of	25,187 38
Additional charges	1,080 12
Total cost of homeward invoices, including charges	157,429 54

Plaintiff's counsel also offers in evidence, from said book, the account sales of the outward voyage of the Harriet Erving.

(Objected to by defendant's counsel on the ground that this suit is barred by a former suit tried in the city of Boston, the objection being taken for the purpose of raising the point by putting in evidence the record of such former suit. Objection overruled, the court holding that it is not time to put in such testimony, and that the defendant can suffer no prejudice by reason of the evidence not being admitted now.)

Plaintiff's counsel read in evidence, the accounts of sales of
46 the outward cargo of the Harriet Erving, 3rd voyage rendered by Alsop & Co., to the defendant, of which the following is a summary:

Account sales at Valparaiso—		
To Dec. 31, 1850	96,361 1	
Less charges	16,419 3	
		80,211 6
To June 30, 1851	100,913 6½	
Less charges	16,521 4½	
		84,392 2
To Dec. 31, 1851	3,499 0½	
Less charges	1,559 0½	
		1,940 0
To June 30, 1852	1,558 02½	
Less charges	314 5 ½	
		1,243 5
To Dec. 31, 1852	2,112 6½	
Less charges	137 6½	
		1,975
To June 30, 1853—		
Sales of Kinander	448 7	
Less charges	45 4	
		403 3
Total net sales at Valparaiso		170,166

Account sales at Lima—		
To June 30, 1851	34,953 5½	
Less charges	5,087 0½	
		29,866 6
To Dec. 31, 1851	6,309 3	
Less charges	7 721 2	
		5,588 4
Total net sales at Lima		35,454 6
Total net sales of outward cargo		$205,620 6

The account sales dated Valparaiso, Dec. 31, 1852, was headed " sales
by Alsop & Co., in continuation m'd'ze, ex. H. Erving, 3rd voy-
47 age, by order of Shirley Erving, esq., for account of W. W. God-
dard, esq'r."

All these accounts were signed by Alsop & Co.

Among the charges are Alsop & Co.'s commissions, which were 4 °|₀ for sales, and 2½ °|₀ for guaranty.

The plaintiff's counsel read testimony of Robert Spavin, from said book, as follows:

ROBERT SPAVIN, called by complainant. I commanded the Harriet Erving on her third voyage; I arrived at Valparaiso somewhere about December 1st; I think December 8; I had instructions from Mr. Goddard to go to Mr. Foster. In the absence of Foster I was to go to Alsop & Co. and receive my instructions from them, who would do the business of the ship; I believe I have his instructions to that effect. Foster was there and attended to the business of the ships. My cargo was prepared there for me in part. I loaded there about two hundred tons, just merely ballast; I then received instructions from Foster to proceed to Coquimbo and take in copper there; I found it prepared for me there—all prepared and ready. Then my instructions were to proceed to Talcahuano; there I took in wool; (Coquimbo was out of my way to the northward;) I found the cargo there prepared for me; I had
my instructions from Foster in writing, (a press copy is pro-
48 duced, dated Dec. 27, 1850, being the same letter given above.)

Cross-examination:

Mr. Foster did not go to either of the places with me. I saw the person referred to in Foster's letter; I said nothing about my instructions; I found him on the spot and everything ready. He had his instructions. I can't say whether I said to him I was there to receive copper for the ship. He was there while the copper was on board; he weighed the copper; some himself, some by his men; he hired the men. I was at Coquimbo four or five days. The copper was in the yard, four to five hundred feet from the water, with a fence around it; I did not take all that was in the yard; I had nothing to do with loading the copper; I took on board what Branninger brought me; I then went to Talcahuano; was there four or five days. José Galan was sick at Conception. An agent of his put the wool on board as the copper had been; it was taken from storehouses. The agent put it on board in the same style and manner as the copper had been put on board. We then went opposite and put on more. The agent went with me to tow in the same harbor. I sailed thence for Boston on the 27th or 28th of February, 1851, I think; I am not certain.

Direct examination:

49 There was no necessity for Mr. Foster to go with me to Coquimbo—no use whatever—could get along just as well without him.

The following facts admitted were also read in evidence from said book by plaintiff's counsel:

That Foster reached Valparaiso from the United States, in the Robin Hood, Oct. 3, 1843.

That Foster left Valparaiso for the United States November 30, 1848.

That Foster received from Alsop & Co., on account, on or about January 1, 1851, $15,000, (item appears in the account,) and notified Goddard as per letter, produced.

That Foster rendered no account of his expense of living, (see his affidavit.)

That Foster joined the house of Alsop & Co. January 1, 1851.

That the business of Goddard was thereafter conducted by Alsop & Co., as they had done it before.

That Shirley Erving arrived at Valparaiso November 1, 1851, as the agent of Goddard.

That the account of sales and the account-current produced are those rendered to Goddard by Alsop & Co.

That Foster did not go to Coquimbo in the Harriet Erving.

Plaintiff's counsel also puts in evidence deposition of Edward L. Stevens, of Boston, taken May 21, 1868, at Boston, before a United
50 States commissioner, and also offers in evidence Exhibit A, attached to the deposition of the witness, Stevens, being the statement of account of adventure to Valparaiso on third voyage of the Harriet Erving.

(Defendant's counsel objects to the reception of the evidence, except under the first count of the declaration, on the ground that it is not admissible under the counts claiming a quantum meruit.

The court admits the testimony, stating that the application of the proof can be made hereafter. Defendant excepts.)

Said Stevens, in his deposition, testified that he lived in Boston, and had been defendant's book-keeper since 1851; that the Exhibits A and B, annexed to his deposition, were in his handwriting, and were made up by him from the defendant's books; that the defendant directed him to make up the account of the voyage from his books, but he did not supervise my making up of them, nor examine or approve them in my presence; that they were handed by him to the plaintiff, by defendant's direction, and are the same accounts proved by defendant in the cases of Foster vs. Goddard and Goddard vs. Foster in the circuit court of the United States for the first circuit and district of Massachusetts in the year 1857, or a duplicate of them.

51 That Exhibits C and D, annexed to his deposition or duplicate of them, were used as parts of Mr. Goddard's proofs in said cases; that C was in deponent's handwriting and made up by him; that it shows the profits of the outward and homeward voyages and a statement of Mr. Foster's share of the profits, with interest, made up to March 1, 1858; that D was not in his handwriting, but is a correct transcript of the final settlement of that voyage; that the pencil memorandum on D was, he thought, in the handwriting of Mr. Goodrich, Mr. Goddard's counsel; that certain deductions were, by agreement, made from the account, as stated in C, for bad debts, and a carriage included in C by mistake, making the result as stated in D, the deduction

on account of the carriage being on Mr. Foster's fourth part, $118.59; that the interest was computed to March 1, 1858, in Exhibit C, by direction of Mr. Goodrich, Mr. Goddard's counsel; that interest is computed to the same date in Exhibit D.

Plaintiff's counsel then read Exhibits A, B, C, & D.

Exhibit A is an account of adventure to Valparaiso per ship Harriet Erving, 3rd, showing—

Cost of outward cargo, (cash, August, 1850)	$171, 745 63
Net proceeds of sales of outward cargo, cash, Sep'r 6, 1851	205, 620 74
52 Balance to credit, cash, Sep. 6, 1851	29, 492 22

Exhibit B is a similar account of the homeward voyage, showing—

Cost of homeward cargo	131, 162 12
Net proceeds, do., cash, Nov. 27, '51	208, 606 84
Balance to credit, cash, November 27, 1851	39, 403 79

Exhibit C shows:

Total balance outward and homeward voyages	68, 896 01

George J. Foster.

1851.		
Sep. 6. By ¼ bal., outward cargo ac.	7, 375 55	
Int. to March 1, 1858	2, 866 79	
		10, 242 34
Nov. 27. By ¼ balance, homeward cargo ac.	9, 850 95	
Int. to March 1, 1858	3, 695 77	
		13, 546 72
Amount March 1, '58		23, 789 06

Exhibit D shows certain bad debts amounting to $6,629.29, and states balance, March 1, 1858	$23, 600 47
Deduct ¼ bad debts	1, 657 32
	$21, 943 15

53 The pencil memorandum on Exhibit D is, "We wish to have the enclosed amendment made to printed report, p. 79.

"Result of 3rd voyage of ship Harriet Erving. If allowed, the effect will be to reduce the bal. of $23,600.47 to $21,943.17."

George J. Foster, the plaintiff, being sworn in his own behalf, testified that he had been engaged in mercantile business since 1834; that he was first engaged in the China trade; that in 1838 or 1839 he went out to the west coast of South America as a passenger, to study the trade on that coast; that he made two voyages out and back for the defendant in 1840 to 1842 as supercargo on an interest in the voyage; that in 1843 he went out under the first agreement with defendant; that during that time defendant sent out three and in some years there may have been four vessels a year; that under that contract he resided at Valparaiso; that during that time and ever since the defendant has resided and had his business establishment in Boston; that he, (Foster)

became a resident of New York in 1838, and has ever since made it his home when in this country; that he returned in 1848 and remained in this country four months, and there saw the defendant, and had a great deal of conversation with him about the business; that defend-
54 ant told him that Mr. Bartlett, a partner in Alsop & Co., residing in New York, had said that he did not wish to deprive him, (defendant) of his agent, and asked if he might ask him (Foster) to join the house of Alsop & Co.

The witness was asked "Was anything said in that conversation in regard to going into the house and still being an agent of defendant?"

(Objected to on the ground that as this matter is covered by the agreement which has been read and which requires Mr. Foster to devote his whole time to the agency of Mr. Goddard, the agreement cannot be varied by the previous permission of Mr. Goddard, that Mr. Foster should assume the duties of a member of the house of Alsop & Co.; objection overruled; defendant's counsel excepts.)

Ans. He merely said that he did not see any reason why I could not join Alsop & Co. and still carry on previous relations with him. I merely replied that that was very doubtful, though I did not know entirely what the rules of Alsop & Co. were on this subject.

55 The witness further testified that he went to Valparaiso in 1849, and remained there till 1856; that in this business of the defendant he received the cargoes, attended to their discharge, saw that all the wants of the ship were provided for in the way of lighters, and sent off ballast to the ship, transshipped the cargo to various points on the coast elsewhere for a better market, carried on the entire correspondence, made out his market reports, made notes of cargo for every vessel, overlooked all the sales, attended personally to everything, and (what was more important than all the rest) formed from his own ideas all the remittances or return cargoes upon which the principal profit was realized; that the return cargoes suggested by him were paid for by Alsop & Co.; that the procuring of remittances was largely a matter of contract beforehand; that in order to be able to despatch the ship promptly these preparations required four or five months to get together, the requisite amount of copper, wool, &c.; that Alsop & Co. merely bought and paid for what he ordered, advancing the money therefor; that he had an understanding with them as to sale & prices of the goods received from Boston; that Alsop & Co. made and rendered account of all the sales and received their commissions on both sales and purchases, viz: on purchases of copper, one per cent.; hides, 2½ per cent.; wool, 5 per cent., which latter included 2½%
56 to their agent in Talcahuano, on sales when he first went there; 5 % and 2½% guaranty, but they were somewhat reduced after he went to Valparaiso. During the last 5 years he was there, it was, he thought, 5 per cent. commission and guaranty; that the commissions of Alsop & Co., in respect to purchases and sales on the H. Erving, 3rd voyage, were the same as on the preceding business with the defendant; that by letter of the 22 of Feb'y, 1850, he communicated to the defendant his purpose to join the house of Alsop & Co., and that he received defendant's letter of April 13, 1850, (given above,) on or before May 29th; that at the time he received this letter there were the remainders of half a dozen outward cargoes to be disposed of; that the last ship dispatched from South America before the H. Erving, 3rd, was the Crusader, which sailed from Valparaiso on the 10th of June, 1850; that after the Crusader left, leaving out of the question this 3rd voyage of the Harriet Erving, there remained nothing to be done under the second

contract with Mr. Goddard, except the disposal of these remainders which were in the hands of Alsop & Co. for sale; that generally they sold all that was actually saleable in the course of a week after the
ship's arrival. He had known a couple of hundred thousand
57 dollars worth to be sold in a day, and a whole cargo sold and
finished before a vessel left on her return; that these remainders were where the invoices had been rather heavily charged with more or less dry goods which would be on hand to await a demand. These remained in the hands of Alsop & Co. for sale; that Alsop & Co. were aware during the whole period of his acting as Mr. Goddard's agent, of his communication with Mr. Goddard; that he resided with Mr. Riley, the managing partner there of Alsop & Co.; that he joined the house January 1, 1851; that about the time he wrote the letter to the defendant dated Feb'y 22 1850, (given above,) Mr. Riley either gave him the articles of the house to look over, or told him what they contained in regard to the particular point referred to in that letter.

That the business of the Harriet Erving, so far as it had been completed when he joined the firm of Alsop & Co., had been done in the usual way through that firm; that there was then merchandise from that ship in charge of Alsop & Co. for sale; that they generally expected a ship every four months, sometimes every three months.

The witness was asked when was the new arrival to be expected, as the matter stood in Feb'y 9, 1850.

(Objected to as immaterial, as the fact of when the vessel did arrive
is shown, and therefore the expectation of the witness can have
58 no significance; objection overruled; defendant excepts.)

Ans. I suppose about the 1st of June, and then another in about four months. These two vessels, the Erving and Crusader, then alternated.

The witness further testified that he commenced, in August, to provide for the return voyage of the Erving; that it was winter there, and they picked up copper and everything very slowly. The Erving made a long voyage out, and the cargo would have been ready if she had arrived a month before; that, as to this voyage, he formed the remittances, and got them together ready for the ship. She was very promptly despatched. Her tonnage was 616 tons, and she carried about 1,000 tons. She took on copper at Valparaiso, as ballast, and sailed for Coquimbo, where she took copper, and for Talcahuano, where she took wool; that he did not go to Coquimbo and Tal'ahuano; that there was no occasion for his doing so; that the business at Coquimbo and Valparaiso was transacted by Alsop & Co.'s agents; that the business of this voyage, so far as regards the despatch of the ship and cargo at these ports, was transacted exactly as the business had been previously
transacted; that when he joined the house nothing remained to
59 be done by him as to the despatch of the homeward cargo; that
he had then sold of the outward cargo $96,000, and he considered nine-tenths of all there was to be done was done when he despatched the ship on the 27th of December. What is called the 3rd voyage comprehends a voyage out and back; that he took the place of Mr. Riley in the firm when he joined it, January 1, 1851, and became the active, managing partner of the house there; that Mr. Riley came home and became the agent of the house here, still being a partner; that Mr. Riley remained on the coast till March, and a good part of the time in Valparaiso; that after he joined the house the house continued to trans-

act the unfinished business of Mr. Goddard in precisely the same way they had done before, for the same commission.

The witness was asked: After you joined the firm what did you personally do in regard to unfinished affairs, and the third voyage of the Harriet Erving?

(Objected to as incompetent in view of the agreement. The court overruled the objection on the ground that the plaintiff offered the evidence in proof of a claim entirely outside of the agreement.
60 The defendant excepted to this decision and to the admission of the testimony.)

Ans. I transshipped to Lima a part of the cargo of the Harriet Erving after I joined the house, because that was a better market. It was soon after I joined the house, probably within a month.

The witness was asked whether that was on ac. Alsop & Co., as consignees, performed in regard to merchandize consigned to them.

(Objected to on the ground that the witness was then a member of the firm of Alsop & Co., and that that firm was in charge of the defendant's goods, and that they sold the goods and sent them to such market as they saw fit, transmitting an account of sales to the defendant; and that was all the witness could know about it. And also, that the witness was asked to put a construction upon the act. Objection overruled; defendant excepts.)

The question was not answered, but the witness was asked by whose direction or discretion these goods were sent to Lima.

61 (To which defendant objected, and being overruled, excepted.)

Ans. By my own. I gave the order to the clerk for a shipment of certain goods, indicating the goods.

The witness was also asked: In the course of the business of Alsop & Co., in transacting the business of goods sent to them as factors, where did they make the sales?

(Objected to by the defendant's counsel; objection overruled; defendant excepts.)

Ans. In Valparaiso. They would not send any merchandise to another port without positive or discretionary instructions from the consignors, or some one representing them.

The witness was asked: Had goods on other previous voyages, in Mr. Goddard's business managed by you in Valparaiso, been sent for sale to other markets; and, if so, by whose order were such consignments in all cases made?

(Objected to by defendant's counsel; objection overruled; defendant excepts.)

Ans. They were sent elsewhere—to Lima, Sandwich Islands, California—by my order, with the permission of Alsop & Co. In no cases were they sent by Alsop & Co. unless by my express instructions.

62 The witness further testified that sales of the Erving's cargo at Valparaiso after Jan'y 1, 1851, were made entirely under his personal direction; that, until Mr. Goddard's new agent, Shirley Erving, arrived there, in November, 1851, there was no person representing the defendant there; that after Mr. Erving's arrival, he (Erving) did nothing in reference to the business of the defendant in finishing the third voyage of the Erving; that when he arrived the cargo was sold within $3,000 or $4,000.

The witness is shown one of the account sales of Alsop & Co., dated Dec. 31, 1852, headed, "Sales by Alsop & Co., in continuation; merchandise ex. Harriet Erving, 3d voyage; by order of Shirley Erving, esq., for account of W. W. Goddard, esq.;" being an account of sales at

Lima in the year 1852; and was asked if he knew the circumstances of the sale by Alsop & Co. of the invoice included in this account, and whether Mr. Erving had anything to do with it.

(Objected to on the ground that this account was forwarded to Mr. Goddard as an account of sales by Mr. Erving. As stated, Mr. Goddard
gave his approval on the supposition that it was done by his
63 agent, and from that time the statement that it was done by Mr.
Erving, his agent, has been acquiesced in, and even if this statement is a mistake, it is not competent for Mr. Foster, after this lapse of time, to correct it. Objection overruled; defendant excepts.)

Ans. Mr. Erving had nothing to do with it. That statement in the account is a clerical error arising from the fact that Mr. Erving was there doing business for Mr. Goddard, and we had new clerks who did not understand the routine. Mr. Erving never knew anything about this account. The witness further testified that the merchandise, to which the account relates, had been sent to Callao before Mr. Erving came out, and within a month after he (Foster) joined the house of Alsop & Co. That Mr. Erving, after his arrival out as Mr. Goddard's agent, in his actions represented Mr. Goddard in his business there in the same way in which he (Foster) had done previously. That Mr. Erving commenced acting for Mr. Goddard on a voyage of the Crusader long subsequent to the third voyage of the Erving.

Plaintiff's counsel put in evidence a letter from Foster to Goddard,
dated Feb'y 25, 1851, containing the following:

64 "I have only time to write you a few lines privately, and indeed
have not much to say. In correspondence with the house you will be abundantly found in information.

"You will observe that I have sold forty bales of Melrose denims at 13¾ c'ts. It is bad enough, but Hemenway was s*a*rving me up with Amoskeags, and as I was selling other goods with them; but I shall sell no more, &c. The ticks and stripes I shall work off somewhat, through Callao."

The witness testified that the goods referred to in this letter were part of the cargo of the Erving's 3rd voyage. That he (witness) returned to this country in 1856, and then saw the defendant, who expressed himself perfectly satisfied with everything he (witness) had done in his business, and promised to attend to the matter of his account at once; that all the payments he had received from defendant had been charged to him in the account under the contracts.

The witness was asked what was the value of his services rendered to Mr Goddard in the business of the Harriet Erving's 3rd voyage.

(Objected to on the ground that the witness had not shown any service rendered, or any claim outside of the contract, and that so far as
the contract is concerned it has already been disposed of.
65 The judge held that services outside of the contract had been
shown, and overruled the objection. Defendant excepts.)

Ans. I consider those services fully worth five per cent. on the net sales of the outward cargo, and five per cent. on the net sales of the homeward cargo, less on both the commissions & charges of Alsop & Co. That he certainly would not go on such a voyage for anything less, and he did refuse to do so for Mr. Goddard. The witness further testified that he sent a memorandum, or note of cargo, to be sent out by Mr. Goddard in the Erving's 3rd voyage, which note was referred to in Mr. Goddard's letter of July 30th, 1850; that the cargo sent out conformed very nearly to this note of cargo.

Plaintiff's counsel also put in evidence letters from Foster to Goddard advising as to sales, markets, goods to be sent out, and information as to prices and prospects of return cargoes, dated April 29, May 2, May 11, May 29, Sept. 25, Oct. 14, Oct. 25, Nov. 5, Nov. 19, Nov. 25, 1850.

The letter of April 29 advises the sending of tobacco by the Erving. The letter of May 11 refers to a note of cargo enclosed for the Erving. The letter of May 29 refers to the same note of cargo, and gives further advice as to outward cargo. The letter of Sep. 25 states what the homeward cargo of the Erving will consist of—copper, goat-skins, 66 and, probably, 5,000 quintals of wool. The letter of Oct. 14 refers to his (Foster's) expectations of receiving a list of the outward cargo of the Erving by the 26 of Oct. which will enable him to judge as to prices to be obtained, and refers to his preparations for sending back a very large amount of wool. The letter of Oct. 25 refers to the cost of the copper and wool to be sent, and enclosed a market report of the same date, which states that the prices at which he had commenced to buy the Erving's copper was 14½ cents. The letter of Nov. 5 states that he, Foster, shall expect good sales from the ship when she arrives. The letter of Nov. 19 states that the Erving had not arrived, and that he expects to make good sales from her. The letter of Nov. 25 refers to Goddard's letters of Aug. 20 and 31, Sept. 9, and Oct. 11, and their contents concerning the H. Erving, "which are carefully noted," and refers to his expectations of the arrival of the ship before the mail closes.

Plaintiff's counsel also read in evidence letters from Goddard to Foster dated May 31, Aug. 20, and Aug. 31, 1850. The letter of May 31 advises of the arrival of the Erving at Boston, May 29, also of the probable failure of the cotton crop and consequent large advance in cotton goods, and states that he has thought it just the moment 67 to buy largely; that about one-third of the mills have stopped, and that many of them cannot resume for 12 months; therefore considering it the last chance to send goods for a long time, he gives a list of goods "secured for the ship" and refers to the misfortune of having the ship to repair, and gives prices ruling for Valparaiso goods. The letter of Aug. 20 informs him the Erving will sail the next day, and that many of the goods, though of high cost, nearly all of them have advanced considerably since they were purchased, and gives the following, among other instructions, as to cargo on board, Beef.—This is all full; hooped and well pickled. For fear, however, of leakage on board ship it ought always to be examined before storing. The mess beef is in oak barrels, and should any of them open dark-colored, please understand it is because the staves were not thoroughly seasoned and stained it. Lard.—And here it is well to remind you that these cases are made of whole sheets, which can easily be unsoldered, and should be valuable with you," &c., &c. The letter of Aug. 31, (part of which is given above,) also contains the following: "You will find the shirtings one bale short, and the tobacco may fall short 8 bales, and the lard 12 cases, though I think the invoice will prove the correct count; yet, as both these articles are in dis- 68 pute here, I desire to be informed soon as possible how they turn out. This lot of blue drills were dyed to my order, and you will find them very dark denims, &c. Sugar.—A very great saving will be made by allowing this real tare, which can be easily ascertained by starting a few boxes for average. Lard.—I notice your remarks under date of July 12; never fear ours, as it will keep sweet for years, &c. Chewing tobacco.—I notice your large sales of this article at 11 cents. Please sell no more at such rates."

Cross-examined.

The witness testified that he discontinued the China business in which he was engaged before entering in Goddard's employ as supercargo. In the China business he was supercargo; after leaving the China business he went one voyage as passenger to that coast, and made two voyages for Mr. Goddard as supercargo before entering into the first agreement. The goods were always consigned to Alsop & Co., although he had the right to direct to whom they should be consigned. Alsop & Co. were to take charge of outward cargoes, and advance for the purchase of homeward cargoes; while acting as Mr. Goddard's agent in Valparaiso, he resided with Mr. Riley, one of the firm of Alsop
69 & Co. He continued to reside with him seven years and a
half; during all that time they were doing Mr. Goddard's business as consignees of cargoes; that he thought he had no instructions from Mr. Goddard to consign to them. Thereupon the following extract from an amendment to witness's bill of complaint, in the suit in Massachusetts was read to him, as follows:

"And now the said Foster, by leave of the court first had and obtained, amends his bill by striking from the third page of said bill the following words: 'by whom the said merchandise was sold and the proceeds thereof invested in other goods and merchandise, which were shipped by your orator and consigned to the said defendant and at said Boston; that said returned cargoes were then sold by said defendant, by whom also books, papers, and original vouchers were kept showing the exact profit and loss upon each and every such adventure or shipment, but that your orator always sent all his accounts of his sales and management of said business, and of the outward cargoes and of his purchases of the homeward cargoes, to the said defendant,' and inserting in place thereof as follows:

"With instructions to place the same for sale in the mercantile house of Alsop & Co.; that such sales were made by said house, and that return cargoes were purchases by said house, who were paid com-
70 missions therefor, which return cargoes were sold in the United
States by the defendant."

Witness said that he did not remember such instructions as were mentioned; that he presumed the amendment must have been made by his counsel in forming the case.

The affidavit appended to the amendment was then read to witness as follows:

"Personally appeared the above-named George S. Foster and made oath to the truth of the above statement and matters as amended, before me, Aug'st 13, 1857.

"H. W. FULLER, *Clerk*."

Witness said he supposed this was a matter of form.

Witness further said that, by the terms of his contract with Goddard, he had the right to withdraw consignments from Alsop & Co. if he found they were not dealing fairly with him; or, in other words, he was to protect Goddard's interest as against Alsop & Co., as well as against everybody else; that he thought that after becoming a member of Alsop & Co. he could protect Goddard's interest as against Alsop & Co., as well as he could before joining the firm.

Being asked whether, in his opinion, there was nothing inconsistent in the two employments, he said that, as a member of the firm, he thought he would do nothing for Mr. Goddard that he would not do ex-
71 actly as if he was his agent; that he was not aware that Alsop

& Co. had any adverse interest against which he protected Goddard before he joined the firm; that the discretion given him to take property out of Alsop & Co's hands was to provide against the occurrence of an adverse interest; the purchases were in his discretion, not in Alsop & Co's. One of his letters advised Goddard that he ought to have an agent, as Alsop & Co. bought what he requested and directed; acting as Goddard's agent, he did not see any reason why they were not proper persons to act as agents for Goddard, as they were upright and honest. He did not accompany the H. Erving to Coquimbo. She left Valparaiso, 27 Dec'r, 1850, three days before he became a partner of Alsop & Co. He could have gone to Coquimbo or Talcahuano, after becoming a member of Alsop & Co., if it were necessary. It would not have taken longer than the month of March. Mr. Riley stayed until then, and would have stayed longer if it had been necessary. When a man becomes a member of a house they must take him with all his balances. He was not so occupied but that he could have gone on this voyage, but there was no obligation for him to do it. He attended to
those matters personally in former years when there were green
72 captains and did not like Alsop & Co.'s agents at those places,
but in 1848, when Alsop & Co. appointed agents in whom he had great confidence, he did not see that it was necessary for him to go to these places, and it never was necessary. He did not go because Alsop & Co. appointed perfectly proper agents at Coquimbo and Talcahuano, and they provided the return cargoes. And they provided the return cargo of the Harriet Erving under our directions, so that he did not personally attend to the labor of providing the return cargo, and never did attend to this labor

Defendant's counsel then read to witness an extract of his letter to Goddard of Jan'y 25, as follows:

"I shall write you, from time time, a private letter when I see that your interest requires it, but the berth I have taken is a very laborious one, and I have wished a thousand times that I was back with you. You have really no idea of it. It is not only the sales, but the great weight of correspondence attached to it likewise."

Witness said he certainly thought he could have gone to Coquimbo for a month if it had been necessary, as Mr. Riley could have attended to the business of the house. He thought instructions to the agents to prepare the return cargo must have been sent to Alsop & Co's agents
by him. He thought he must have addressed them upon the
73 subject. The return cargoes must have been provided by Alsop
& Co.'s agents under directions from them. He considered that nine-tenths of the value of the voyage and nine-tenths of the labor was done when the ship was despatched before 1st January, 1851. The greatest part of the labor, so far as he was concerned, consisted in forming the return cargoes or remittances and in deciding what they should consist of, but he does not pretend that his opinion as to this was better than Mr. Riley's. After he took Mr. Riley's place in the house of Alsop & Co., the responsibility of deciding what sales should be made and the correspondence relating to sales devolved upon himself. As a member of Alsop & Co. he had control of sales of goods by Harriet Erving's 3rd voyage the same as of other goods by the house. During his whole residence in Valparaiso, as Mr. Goddard's agent, he lived at Mr. Riley's house, free of expense, and slept in his own rooms. Mr. Riley invited him to board at his house and he took the invitation to be nothing more his desire to have company. He did not know that there was any arrangement as to this between God-

dard and Alsop & Co., but he knew it was one of the terms in an agreement which Mr. Goddard proposed to make with Huth, Granning & Co.

THEODORE W. RILEY, for pl'ff.

74 I am a retired merchant. I was active managing partner of
Alsop & Co., from 1840 to 1856, in Valparaiso until 1851, and in
New York for the remainder of the period. I retired from active business in 1856, but I still have an interest in the house. I think Mr. Foster continued in the house two terms, or ten years. I left Valparaiso about the the middle of Feb'y, 1851, and the coast in March. During Mr. Foster's agency for Mr. Goddard, he resided in the domestic establishment of Alsop & Co., over which I presided. My impression is that at first this was a mere compliment I intended to Mr. Foster, but afterwards, I think, there was a provision in Mr. Goddard's agreement that his agent should live in the house free of expense. During Mr. Foster's agency Mr. Goddard's business with Alsop & Co. was transacted thus: Mr Goddard sent the shipping documents, such as bills of lading, &c., direct to Mr. Foster, and he handed them over to Alsop & Co., instructing them in regard to the sales to be made and they were always made under his knowledge, and frequently under his instructions. Sales at other ports than Valparaiso depended on Mr. Foster's desire and consent. We should not have sent goods to other ports in any case
without positive or discretionary instructions from the owners. I
75 have every reason to suppose that Mr. Foster conducted Mr.
Goddard's business with great sagacity. I know how it was
done. We were in constant communication. We lived in the same home and during the whole period we were friends and intimates. He had no business there other than Mr. Goddard's agency. Mr. Foster always informed us of Mr. Goddard's requirements for the purchase of homeward cargoes in advance of the arrivals of the ships, and we made large advances for this purpose to be reimbursed by sales of cargoes to arrive. Mr. Foster directed what our house was to buy and we furnished the requisite funds, and we had a commission on purchases and sales.

I remember the H. Erving's last voyage and never knew any difference in Mr. Foster's action in regard to it, and to previous voyages. I knew the state of completion of the business of this voyage on the 1st Jan'y, 1851, when Mr. Foster joined the house.

Q. What was the understanding between Mr. Foster and yourself as to his completing the business of the Harriet Erving's 3rd voyage, after he joined the house?

(Objected to as immaterial and incompetent to affect Mr. Goddard. The court held that the witness might state anything that he knew that the plaintiff was in fact doing in respect to the 3rd voyage of the
Erving. Defendant excepts.)
76 A. He continued to superintend this business in the same man-
ner as previously.

The witness further testified: I was aware of his doing so, and neither I nor any member of the firm made any objection. So long as I remained in Valparaiso, Alsop & Co. conducted Mr. Goddard's business in the same manner as before 1 January, 1851, and I presume for the same commissions. Before Foster joined Alsop & Co., their correspondence with Goddard was generally through Foster. Our advances to Mr. Goddard to purchase return cargoes would at times be as much as two or three hundred thousand dollars, and sometimes even more than this.

I think I am capable of judging of Mr. Foster's experience and ability in this kind of business.

Q. What is your judgement as to his capacity and experience in that commercial duty?

(Objected to on the ground that Mr. Foster has not been proven to be under any obligation to render services outside of the contract. Overruled; defendant excepts.)

A. The best answer I can give to this question is, that we invited him to join the house.

Q. $205,000 is the net sales in Valparaiso of Erving's outward cargo,
and $208,000 the net sales in Boston, the return cargo. What, in
77 your judgment, would be the value of Foster's services as agent
there in the transaction of the business of Mr. Goddard, on that
voyage of the Harriet Erving?

(Objected to on the ground that a special agreement having been proved, plaintiff cannot recover a quantum meruit. Overruled; exception by defendant.)

A. I should say five per cent. on the net proceeds at both ends of the voyage.

The witness further testified: I should think there was no difference in value between the agent's services in despatching outward cargo or purchasing return cargo. Purchasing a return cargo usually takes two or three months. It is of importance that the cargo should be ready to despatch the vessel as soon as possible, in order to save time and interest.

Remittances are usually made in that trade by return cargoes of merchandise, and the prosperity of the adventure depends as much upon one cargo as upon the other.

Cross-examined:

The copper was bought at various points—Coquimbo, Valparaiso, and
Capia del Paul, to a small extent. Wool was commonly bought in Tal-
cahuano and Valparaiso, and goat-skins principally in Coquimbo. We
had an agent in Coquimbo, named Branninger, and one also at
78 Talcahuano, whose name I don't remember. The return cargo of the
Erving's 3rd voyage was taken on board at these two ports and
Valparaiso. All this cargo was bought by Alsop & Co., or their agents, at the places named, and Alsop & Co. paid for it Mr. Foster did not go to either Coquimbo or Talcahuano, and the preparations at those places for the return cargo on this voyage must have been made by our agents. These agents conducted the negotiations with the dealers, and if good bargains were made in either copper, wool, or goat-skins, they were made by our agents and not by Mr. Foster. Mr. Goddard, however, and not our house, received the benefit of them. Our firm charged a commission of one per cent. for purchasing copper, taking care of it, and shipping it. What Mr. Foster did as to the purchase of copper made at Coquimbo, was to give the order to purchase and approve the price. The price was the market price.

Plaintiff's counsel offers computation in evidence, subject to correction, as follows:

¼ profits, without interest, corrected by deducting amount stated by Mr. Stevens as bad debts, out and in voyage both	15,864 71

The computation being from Sep. 6, 1851, on outward,
79 and November 27, 1851, on homeward, cargo, the re-

spective amounts being stated as due on those days in the accounts produced by Mr. Stevens, ¼ with interest to March 1, 1858, as stated by Mr. Stevens, corrected.....	21,943 15
Interest from March 12, 1858, to December 1, 1870, at 7 per cent..	19,584 12
5 per cent. on net sales, out and home, on $414,227.58......	20,711 37

Plaintiff rests.

And the defendant's counsel then offered in evidence the following judgment on a suit in chancery, brought by George J. Foster against Willam W. Goddard, in the U. S. circuit court for the district of Massachusetts, to recover the amount due to him under the contract of 7th May, 1849, hereinbefore offered in evidence. A copy of so much of said record as is important, is as follows:

80 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty-nine, before the Honorable Nathan Clifford, associate justice, and the Honorable Peleg Sprague, district judge.

GEORGE J. FOSTER, COMPLAINANT IN EQUITY,
vs.
WILLIAM W. GODDARD, DEFENDANT.

Bill of complaint.—Filed May 1, 1857.

To the judges of the circuit court of the United States of America, for the first circuit.

George J. Foster, of New York, in the State of New York, and a citizen of said State, merchant, brings this, his bill, against William W. Goddard, of Boston, in the State of Massachusetts, and a citizen of said State, merchant. And thereupon your orator complains and says, that on or about the twenty-fourth day of June, A. D. one thousand eight hundred forty-three, he entered into an agreement with the said Goddard to proceed to Valparaiso, there to reside, and devote himself exclusively for five years to the management of said Goddard's business. That said agreement was reduced into writing, was signed by your orator and the said defendant, and was in the words and figures and to the purport and effect following, viz:

"This memorandum of an agreement, entered into this 24th day of June, 1843, by and between William W. Goddard, on the one part, and Geo. J. Foster, both of Boston, on the other part, witnesseth:

"That said Foster engages to proceed at once in the ship Robin Hood direct to Valparaiso, and that he will there remain for the term of five years, and devote himself for the whole time exclusively to the management of said Goddard's business, such as the sale and purchase of cargoes, collecting freight-moneys, procuring return freights, eliciting orders for the purchase and shipment of goods for the coast, effecting the sale of vessels when wished, and collecting

and forwarding all the information that may be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard, in strict accordance with his instructions, whose interest he is to care for and protect from frauds, impositions, false and unjust charges, and also extravagant expenditures of the ship-masters, to the best of his ability; he is also to
81 give to each vessel the greatest possible dispatch that may be consistent with the owner's interest.

"In consideration of which said Goddard engages that said Foster shall at the expiration of five years be entitled to one-tenth of the net profits of his business in that trade, after deducting interest at the rate of six per cent. per annum on the capital invested, and all costs and expenses of whatever name and nature that may be incurred [both] at home and abroad, in sailing, victualling, manning, and keeping in repair the vessels employed, including all port charges, as also the actual expenses that may appertain to the goods themselves, including the cost of said Foster's living, which is not to exceed six hundred dollars per annum; and, furthermore, said Goddard has the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit attendant thereon to be charged or credited in the general account. The vessels now designed for the trade, are the ship Robin Hood and bark Roscius, and are valued. the Robin Hood at ten thousand five hundred dollars, cash, at the completion of her last voyage; and the Roscius at eight thousand dollars, cash, on the completion of her present voyage. It is also understood that said Foster's interest of one-tenth is liable to the full extent for all the risks and casualties in the business, attendant upon the goods and vessels.

"It is furthermore agreed that said Foster shall be entitled to a compensation of one thousand dollars per annum, in lieu of his share of the profits, should it fall short of that amount; it is understood, however, that this is not in addition to his share of the profits, and that the profits of the business are not to be abstracted until the expiration of the five years agreed upon.

"Said Foster is also hereby authorized to call to account and to displace any and all masters of vessels that may be sent out by said Goddard, and replace them with others, should he find it expedient so to do.

"The words 'both' and 'at the completion of her last voyage,' being interlined before signing.

"In witness whereof we have hereunto set our hands and seals.

"W'M W. GODDARD. [AND A SEAL.]
"GEO. J. FOSTER. [AND A SEAL.]

"In presence of—

"Signatures acknowledged in presence of—
"THEO. MACHETT."

as in and by the said agreement, reference being thereto had, will appear. And your orator showeth, that in pursuance of the said agreement, and immediately upon its execution, he left the said United States, and proceeded to Valparaiso in said Chili, where he continued to reside during the time limited for the continuance of said agreement, and did in all respects duly keep and perform all matter sand things therein provided on his part to be kept and per-

82 formed. The the general mode of conducting said business was by adventures and shipments of merchandise procured at said Boston by said Goddard, and consigned by him to your orator at Valparaiso, [by whom said merchandise was sold, and the proceeds thereof invested in other goods and merchandise, which were shipped by your orator, and consigned to the said defendant at said Boston. That said return cargoes were then sold by said defendant, by whom also books, papers, and original vouchers were kept, showing the exact profit and loss upon each and every such adventure or shipment; but that your orator always sent all his accounts of his sales and management of said business, and of the outward cargoes, and of his purchases of the said homeward cargoes, to the said defendant;] and that the said defendant, and not your orator, has in his possession and control the full means of stating said accounts, and the exact amount of such profit and loss. That on the fifteenth day of January, A. D. one thousand eight hundred and forty-nine, your orator returned to the United States, the time limited for the existence of said agreement having then expired. That there was then due and owing to your orator, from moneys then in the hands of said Goddard—being your orator's share of the profits upon said adventures or shipments, according to the terms of said agreement, when said accounts shall be justly taken, made up, and stated, according to the books, papers, and original vouchers aforesaid—a large sum of money, to wit, about thirty thousand dollars, as your orator believes; but that your said orator, for the purpose of accommodating the said Goddard, did then, at said Goddard's request, forbear to insist on having said accounts made up from said books, papers, and original vouchers, and to claim and receive of said Goddard the said moneys so due him as aforesaid, but left the whole of his share of said profits, except two thousand dollars, in the hands of said Goddard, in pursuance of the provisions of certain new articles of agreement, hereinafter set forth, and to form a part of a capital for the partnership thereby formed. That afterwards, at said Boston, your orator entered into another agreement, with said Goddard, to form a partnership to conduct the business aforesaid, which agreement was reduced to writing, signed by your orator and the said defendant, and was in the words and figures and to the purport and effect following, viz:

"This memorandum of an agreement entered into this seventh day of May, 1849, by and between William W. Goddard, on the one part, and George J. Foster, both of Boston, on the other part, witnesseth:

"That said Foster engages to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and California, exclusively to the management of all said Goddard's business in those countries, such as sale and pur-
83 chase of merchandise, and any other property, collecting freight-moneys, procuring freights, and consignments of goods, eliciting orders for the purchase and shipment of property, investing money, drawing and negotiating bills of exchange, and forwarding all the information that can be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard, in accordance with his instructions and best interests, which he is also to care for and protect from impositions, unjust charges, and also extravagant expenditures of the ship-masters, to the best of his ability.

"In consideration for which said Goddard engages that said Foster shall, on his return, be entitled to one-fourth part of the net profits of his business in that trade that he (said Foster) shall have conducted to completion, after deducting interest on the capital furnished by said

Goddard, as also all costs and expenses of whatever nature that may be incurred, both at home and abroad, in prosecuting the business, including the expense of sailing and keeping in repair the vessels employed, together with the port charges, as also the cost of said Foster's living, which is not to exceed one thousand dollars per annum; and, furthermore, said Goddard has the right of purchasing, chartering, freighting, and selling the vessels designed for the trade at his option, the profit or loss attendant thereon to be charged or credited in general account. The vessels now designed for the trade are the ships "Crusader" and "Harriet Erving," which are to be charged in account, the former at the value that may be agreed upon between W'm W. Goddard and Samuel Goddard in settlement of their account—the latter at the cost of construction and equipment when new, abating nothing for the use of the ship for her present and first voyage.

"It is understood that said Foster is to leave in hands of said Goddard, bearing interest, what funds he may have, less two thousand dollars, to be paid him before leaving this country, and that neither the same or any portion of his profits shall be abstracted until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any time by giving said Goddard so much notice that any voyage he may have commenced previous to receipt of such advice shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise. It is also understood that said Goddard has the right to annul this agreement whenever he may choose to do so; and, furthermore, that said Foster is liable to the full extent of his interest and means for all the losses that may be made in this business, as also for all the risks and casualties attendant thereon.

"Said Foster is hereby authorized to call to account and to displace any and all masters of vessels that may be sent out by said Goddard, and to replace them with others, should he find it expedient so to do.

"The words 'interest and means' interlined before signing.

"W'M W. GODDARD. [AND SEAL.]
"GEO. J. FOSTER. [AND SEAL.]

"In presence of—
"CH'S W. FOSTER."

84 as in and by said agreement, reference being thereto had, will appear.

And your orator further showeth that the said copartnership business was forthwith entered upon and conducted by your said orator and the said Goddard until the thirty-first day of December, A. D. one thousand eight hundred and fifty, when the said agreement was terminated by the said orator's giving due notice to the said Goddard in the manner provided for in and by said agreement; that your orator did immediately after the making, and in pursuance of said agreement, proceed at once to said west coast of South America, and did in every respect perform each and every matter and thing which under and by virtue of said agreement was to be done by him; that the said copartnership business was conducted under said last-mentioned agreement by means of shipments and adventures in a manner similar in all respects to that in which the business was conducted under the said first-mentioned agreement, as herein'fore set forth; that the amount of profit or loss which accrued upon the several adventures and shipments and business transacted under the said second agreement is fully shown by certain books of accounts, papers, and original vouchers kept by and in the possession of said Goddard, and to whom your orator always sent [his part of the accounts touching the copartnership business transacted by your orator while absent thereon,] and that all of said books, papers, vouchers, and accounts are in the hands of said Goddard, and out of the control of your said orator.

And your orator further shows that your orator's share of the profits of said business is now in the hands of said Goddard, together with the amount of your orator's share of the profits of said business, conducted under the first agreement herein above set forth, and left in said Goddard's hands as capital, as above alleged, amounting in the whole, with legal interest due thereon, to the sum of eighty thousand dollars, as your orator believes, the exact items and details of which, however, can only be gained from the books, papers, and original vouchers aforesaid, in the hands of said Goddard; but that the said Goddard, who has always had the entire management and control of said books, papers, and original vouchers, alleges that he hath never balanced the same, nor made up an accurate account of said profits and capital, though he hath often requested, as hereinafter set forth, by your orator so to do. And your orator shows that after the termination of said second agreement and while your orator was in South America, he did frequently request the said Goddard, by letters, to balance said books, and to make up and furnish to your orator accurate accounts of the profits of said business, conducted under each of the agreements aforesaid, with which just and reasonable requests the said defendant hath not complied, as in justice and equity he ought to have done.

And your orator further showeth that, at the time when the said second agreement, last herein above set forth, terminated as aforesaid, he
was absent from the United States, to wit, in Chili, in South
85 America, and that he did not return to the United States until
the month of March, A. D. one thousand eight hundred and fifty-six, when he arrived in the city of New York, where he hath resided ever since. That since his return he hath frequently requested the said Goddard to come to a full and fair account in respect of the said copartnership transactions, to make up and furnish to your orator a full and true account of all the profits and interest on moneys to which your said orator is entitled under said agreements, and each of them, and to pay to your orator the amount thereof, all of which requests the said Goddard hath refused to comply with, and, at times, pretends that there is not due to your orator so large an amount under each of said agreements as your orator alleges as above to be due him; whereas your orator charges the contrary thereof to be the truth, and that so it will appear if the said defendant would set forth a full and true account of all and every his receipts and payments in respect to the said partnership transactions, and of the gains and profits which have been made under each of the said several agreements, by which it would appear that a large balance is due from the said defendant to your said orator in respect of the said partnership dealings, which the said defendant is, as your orator believes, now using and jeopardizing in his own mercantile transactions and adventures. And your orator states that there are certain amounts due to said copartnership for sales of goods made by said Goddard, amounting, as your orator believes, to about the sum of twenty-five hundred dollars; also that a certain quantity of wool, part of one of the said shipments, of the value of one thousand dollars, as your orator believes, is still in the hands of said Goddard, and that he hath unreasonably neglected to collect said money and to sell said wool.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may on his cor-

poral oath, to the best and utmost of his knowledge, remembrance, information, and belief, just, true, direct, and perfect answer make to all and singular the matters aforesaid, as fully and particularly as if the same were here repeated and the defendant here interrogated thereto, and more especially that the said defendant may, in manner aforesaid, answer and set forth a full, true, and just account of all and every the pecuniary dealings and transactions between himself and your orator, and particularly of each and every shipment or adventure made by the said defendant and by your said orator in transacting the said business under each of the said written agreements hereinbefore set forth, and showing the profits made and the loss incurred on each and every such shipment and adventure, and all sums received by said Goddard for the sales of goods and merchandise made to him by the said Foster, or through the instrumentality of said Foster, from the ports of the western coast of South America during the time each of said agreements was in force; and that the said defendant may, in manner aforesaid, answer whether he hath not now, or had not lately, and when last in his possession,
86 any and what books, accounts, papers, and writings relating
to the matters aforesaid; and that he may set forth a full, true, and perfect list or schedule of all and every the said books, accounts, papers, and writings, and may produce and leave such of them as now are in his possession, custody, or power, in the hands of the clerk in court for the usual purpose, and may set forth what have or hath become of such of them as are, or is not now, in his possession, custody, or power; and that said defendant may answer the following interrogatory:

I. Whether he hath not already himself, or by his clerk, examined such books, and ascertained the amount of profits and loss of each and every of such shipment or adventures, or of some, and of how many, and which of them, and caused an account thereof to be taken; and, if so, to annex the same to his answer; and whether it hath not been ascertained by himself or his clerk, that there remains now in his hands a balance, including interest, to the amount of eighty thousand dollars, or to some other and what large amount due from him to the said Foster, under and by virtue of said agreements and the adventures, shipments, and business made and conducted under each thereof by your orator and the said defendant:

And that the defendant may answer the premises, and that an account may be taken of all and every the said dealings and transactions under said agreements between your orator and said defendant, from the time of the commencement thereof, and also that an account may be taken of the moneys received and paid by your orator and the said defendant, respectively; in regard thereto your orator being ready and willing, and hereby offering, to account for the partnership dealings and transactions which have been carried on by your orator in the premises aforesaid; and that the said defendant may be decreed to pay to your orator what, upon the taking of the said account, shall appear to be due to him; and that in the meantime the said defendant may be restrained by the order and injunction of this honorable court from collecting or receiving any partnership debts or other moneys, and that some proper person may be appointed to collect and receive the same, and to make sale of and to close the sales of such merchandise belonging to said copartnership as may still remain on hand; and that proper directions may be given for the conduct and management and closing of said partnership business, and for the protection of the moneys and funds of your orator now in the hands of the said Goddard under said agreements; and that your orator may have such other and further relief in the premises as the nature of the circumstances of this case may require.

May it please your honors to grant unto your orator a writ of subpœna directed to said William W. Goddard, commanding him, at certain time and place to be and appear before your honors, and full, true, and perfect answers make to all and singular the premises, and to each 87 of the foregoing interrogatories, and to abide and perform such other decree in the premises as to your honors shall seem meet.

GEO. J. FOSTER.

CHARLES A. WELCH,
EDWARD D. SOHIER,
Counsel and Solicitors for Complainant.

UNITED STATES OF AMERICA,
Mass. District, ss:

United States district court, May 1, 1857.

Then personally appeared the above-named George J. Foster and made solemn oath that the matters and things stated in the foregoing bill of complaint, so far as stated on his personal knowledge, are true; and so far as stated on information and belief, are verily believed by him to be true. Before me.

S. E. SPRAGUE,
Clerk of the U. S. Dist. Court, Mass. District.

This bill of complaint was entered at the May term of this court, A. D. one thousand eight hundred and fifty-seven, and the following answer was filed (Aug. 3, 1857:)

Circuit court of the United States for the district of Massachusetts. In equity.

The answer of William W. Goddard to the bill of complaint of George J. Foster.

This respondent, reserving to himself all right of exception to the said bill of complaint, for answer thereto, saith:

He admits that on or about the twenty-fourth day of June, in the year eighteen hundred and forty-three, the said Foster entered into an agreement with him to proceed to Valparaiso, to reside there, and for five years to devote himself exclusively to the management of said Goddard's business; that said agreement was reduced to writing, was signed by the parties, and that a true copy thereof of that date is set forth in the complainant's said bill of complaint, to which copy or to the original thereof, which this respondent craves leave to produce in court, he refers as proof of the original agreement between himself and the said Foster.

That in pursuance of the said agreement, and immediately upon its execution, the said Foster left the United States and proceeded to Valparaiso in Chili, at which place, as this respondent has been informed and believes, he arrived on or about the third day of October, in the year eighteen hundred and forty-three, and resided there during the time limited for the continuation of said agreement; but whether the said Foster duly kept and performed all matters and things in the said agreement provided on his part to be kept and performed, the said

Goddard has no personal knowledge, and therefore in regard thereto he requires proof.

Respondent does not admit, but he denies that the general mode
88 of conducting the business was as averred by the complainant in
the said bill of complaint, and he says that it was substantially as follows:

Cargoes were purchased by said Goddard in the United States, and consigned by him to the said Foster at Valparaiso, under instructions to place them with the mercantile house of Alsop & Company, or such other house as this respondent might direct, for sale; and that such sales were made on time by said Alsop & Company, who were paid a commission for selling and also a guarantee commission; that the return cargoes were also purchased by Alsop & Company, who were paid a commission for making such purchases, and that the said return cargoes were sold by the said Goddard in the United States.

Respondent does not admit, but he denies, that he has books, papers, and vouchers which show the exact profit and loss upon each and every adventure or shipment, excepting as follows: He says that, in the prosecution of his business as a merchant, he keeps books of account, such as are usually kept by mercantile houses, and in which he believes the proper entries in regard to all his business transactions have been and are made, from time to time, and in the ordinary course of business; the same having been made by competent book-keepers; and he believes that the said books have been and are correctly kept, and that from said books, vouchers, and papers the true state of the accounts between the parties can be made up with accuracy; but he also says that a transcript of said books, papers, and vouchers will not show the exact profit and loss upon each and every such adventure and shipment, but that to show this would require long and laborious examination, inasmuch as it was the work of a long time, and frequently of several years, to complete the sales of a cargo, portions of which were frequetly reshipped at and from Valparaiso to the Sandwich Islands, and also to the Society Islands, California, and other markets; owing to which facts it was not convenient to keep the accounts of each voyage distinct, nor was this usually so done. And this respondent, upon advice of counsel, avers that the agreement in the said bill of complaint first mentioned, does not impose on him the obligation to render distinct accounts of the several voyages performed.

This respondent, not admitting that the said Foster made any accounts of said sales and of the management of the business and other matters, further answering says, that he does not admit, but, on the contrary, he denies, that the said Foster always sent accounts of sales purporting to have been made by himself, of the management of the said business, and of the outward cargoes, and of purchases made by him of the said homeward cargoes to this respondent, or that, to respondent's best recollection and belief, the said Foster sent any such accounts; but he says that the sales of outward cargoes and purchases of return cargoes were made by said Alsop & Company, who, and not the said Foster, rendered accounts, so far as the same were made at or in the vicinity of Valparaiso.

89 Respondent further says, upon information and belief, that if
complainant made any sales and purchases at Valparaiso or elsewhere, the particulars thereof were furnished by the said Foster to the said Alsop & Company, and the receipts and payments therefor were made to and by the said Alsop & Company.

Respondent believes, and therefore admits, that he has in his possession and control the full means of stating said accounts and the exact amount of profit and loss accruing from the business which was performed under the agreement first mentioned in said bill of complaint, so far as the business has been transacted by this respondent or under his personal direction, and so far as information has been communicated to him by the said Foster, or by the said Alsop & Company, or by other persons; but to do this will of necessity be the work of much time, and of long and careful examination of the accounts and of the items of which they are composed, and of minute inquiry into the history of many of the transactions to which they relate; but whether the complainant and the said Alsop & Company and others have furnished all the papers and vouchers which appertain to the business by them respectively transacted, this respondent has no certain knowledge.

Respondent admits that the said Foster returned to the United States on or about the fifteenth day of January, in the year eighteen hundred and forty-nine, and that the time limited for the existence of said agreement first named had then expired.

Respondent, further answering, says that whether there is any sum of money due from him to said Foster under the agreement aforesaid he does not know and cannot state with certainty until the making up of the said accounts; but he further says that if anything is so due, it is, upon his information and belief, very much less than thirty thousand dollars.

Respondent admits that the complainant, upon his return as aforesaid, forbore to insist upon an account of the business to which the said agreement appertained; he does not admit, but denies, that for the purpose of accommodating him the said Foster did forbear to insist upon having the accounts made up from the said books, papers, and original vouchers, or to claim and receive from respondent the moneys which he alleges were due to him; but he says that whatever was done or omitted to be done was for the accommodation of the parties mutually and not for the accommodation of the respondent exclusively, and was by the mutual consent and agreement of the parties.

And this respondent further says, upon information and belief, that the business transactions under the said agreement had not been closed by sales and collections so as to make it practicable at that time to state a perfect and final account thereof.

Respondent does not admit, but, on the contrary, he denies, that under the said first-mentioned agreement or otherwise, a copartnership was created or by him intended with the said Foster.

90 On the contrary, this respondent avers that the complainant in and by the said agreement, undertook to assist and render certain services in and about the business of this respondent, so far as the same was carried on at Valparaiso, for a certain agreed compensation.

Respondent, further answering, says, not admitting, but denying, that he entered into another or any agreement whatsoever to form a partnership with the said Foster, he admits that an agreement was formed between them, and reduced to writing, and signed by the parties, on or about the seventh day of May, in the year eighteen hundred and forty-nine, a true copy of which is set forth in the complainant's bill of complaint, to which, or to the original thereof, which this responent craves leave to produce, he prays to be allowed to refer as a part of this answer.

Respondent does not admit that any partnership business was entered upon and conducted by the complainant and this respondent after the execution of the said last-mentioned agreement; but this respondent does admit that the complainant, soon after the execution of the last-mentioned agreement, proceeded to the west coast of South America with intent to perform his part of the stipulations in the said agreement contained.

Respondent, further answering, says that in and by the last-mentioned agreement it was and is provided that the complainant might withdraw from the employment of this respondent at any time by giving such notice as is in the said agreement provided; in pursuance of which provision the complainant, on the twenty-second day of February, in the year eighteen hundred and fifty, by his letter of that date, written by him at Valparaiso, notified this respondent that he, the said complainant, had concluded to withdraw from the employment of the respondent, and that he, the complainant, should join the house of Messrs. Alsop & Company on the first day of January, in the year eighteen hundred and fifty-one; and, at the same time, to wit, on the said twenty-second day of February, in the year eighteen hundred and fifty, the said complainant notified this respondent that he, the complainant, elected to determine, on the thirty-first day of December, in the year eighteen hundred and fifty, the relation which had subsisted between the parties under and by virtue of the agreement last above named.

And respondent, further answering, says that the aforesaid letter from the complainant, dated on the said twenty-second day of February, in the year eighteen hundred and fifty, he received at Boston, by the way of the Isthmus of Panama, in the latter part of the month of March, or in the early part of the month of April, in the same year.

And this respondent, further answering, upon information and belief, says that the relation which had subsisted between himself and the complainant, under the said last-mentioned agreement, upon the receipt by this respondent of the complainant's said letter, and upon the advice
therein contained, became and was determined, excepting that
91 the complainant was bound to render his assistance in reducing
into money the property and assets appertaining to the business which, prior to the reception by the respondent of the letter aforesaid, had been carried on by him in his trade upon the west coast of South America and other places, as provided in the said agreement.

Respondent, further answering, says that on the thirteenth day of April, in the year eighteen hundred and fifty, by his letter of that date addressed to the complainant, and forwarded to him in the regular course of communication, the respondent acknowledged the receipt of complainant's said letter of the twenty-second of February, and expressed himself satisfied with the withdrawal of the complainant from the employment of this respondent.

Respondent, further answering, says that whether the complainant did, in every respect, perform each and every matter and thing which, under and by virtue of said agreement, was to be done by him, this respondent does not know, and therefore neither admits nor denies the same.

Respondent says he does not admit, but, on the contrary, he denies that the business, conducted under the said last-mentioned agreement, was a partnership business; and he further denies that the said business was conducted in the manner averred by the complainant in the said bill of complaint; but he avers that the same was in general conducted in the same way and manner as the respondent has hereinbefore averred in regard to the business transacted under the said first-mentioned agreement.

Respondent, further answering, says that the amount of the profit and loss accrued from the said adventures and shipments, and business transacted under the said agreement last mentioned in said bill of complaint, can be ascertained by an examination of the books of account, papers, and original vouchers kept by the respondent, and in his possession, so far as the business has been transacted by this respondent, or under his personal direction, and so far as information has been communicated to him by the said Foster, or by the said Alsop & Company, or by other persons; but to do this will, of necessity, be the work of much time, and of long and careful examination of the accounts, and of the items of which they are composed, and of minute inquiry into the history of many of the transactions to which they relate; but whether the complainant and the said Alsop & Company, and others have furnished all the papers and vouchers which appertain to the business by them respectively transacted, this respondent has no knowledge.

Respondent, not admitting or denying that on a fair and just settlement anything is due to the complainant, nevertheless admits that the complainant's compensation for services rendered in and about the business of this respondent, dependent upon an ascertainment of the profits of the business transacted under the said several agreements, whatever it may be, and excepting the sum withdrawn by the complainant, which this respondent avers to exceed the amount of
92 two thousand dollars, is in the hands of this respondent, but
that the same, with interest, amounts to the sum of eighty thousand dollars, this respondent does not admit, but, on the contrary, wholly denies. And the respondent admits that the items and details thereof can be gained from the books, papers, and original vouchers, but he avers that the same can be done only after long and laborious examination thereof, and a careful analysis of the said papers and vouchers, and after a full and careful and particular inquiry into the history of many of the items to which they relate.

Respondent admits that of said books and of the said papers and vouchers after they came to his possession, he has himself or by his agents had the entire management and control, and that he hath alleged that he hath never balanced the same nor made up an accurate account of said business, so as to show with certainty the profit and loss therefrom arising—all of which is true—and that he hath been requested as alleged by the complainant in his said bill of complaint.

Respondent admits that complainant did, while in South America, frequently, by letter, request him to balance the said books, and to make up and furnish to the complainant accurate accounts of the profits of the business conducted under each of the agreements aforesaid, and that he hath not complied with such requests; but this respondent does not admit, but on the contrary thereof upon his information and belief, and on the advice of counsel, he denies that under the circumstances he should have done these things or have complied with these requests, and he avers that there has been on his part no unreasonable delay, it being a work of extreme difficulty, if not impossible, to comply with these requests while the complainant was in South America, for the reason that there were many matters in regard to which it was important to confer personally with complainant.

Respondent admits that at the time when said second agreement terminated, the complainant was absent from the United States, to wit, in Chili, in South America, and that he did not return to the United

States until the month of March, in the year eighteen hundred and fifty-six, when he arrived in the city of New York, where he hath ever since resided; and not admitting or denying that there is any sum due to the complainant, he admits the requests averred by the complainant in his said bill of complaint, in regard to making up and furnishing accounts, coming to a settlement and paying the amount of any balance, and that he hath not complied therewith; but he avers that there has been on this respondent's part no unreasonable delay, nor any which under the circumstances could be avoided.

This respondent, further answering, says that in and by the said several agreements it is provided that the living of the said complainant at Valparaiso, not exceeding six hundred dollars per year under the said first-named agreement, and not exceeding one thousand dollars per year under the last-named agreement, should be a charge 93 upon the business done under the said several agreements; that the amount so expended is within the personal knowledge of the complainant, as this respondent believes, and is not within the personal knowledge of this respondent. This respondent admits, however, that in the accounts which have been rendered to him by the said Alsop & Company, are, from time to time, contained sundry charges of cash, by them purporting to have been paid to the complainant.

This respondent further says, upon his belief, that the complainant has not furnished to this respondent accounts showing the cost of his living during the several periods of time during which the complainant was employed under the said several agreements.

This respondent, further answering, says that, in and by the agreement in the said bill of complaint last mentioned, it is provided that the value or sum at which the ship Crusader should be fixed in stating an account of the business done under said agreement, should be agreed upon by the complainant and this respondent. That the respondent has at all times been ready to agree the value of the said ship upon request of the complainant being made therefor.

And he further says, that since the return of the complainant to the United States, to wit, in or about the month of March or April, in the year eighteen hundred and fifty-six, the complainant and this respondent did meet and agree the value of the said ship.

Respondent, not admitting anything to be due to a copartnership, but denying, as hereinbefore, any and every alleged partnership with complainant, answering further, says that he has had certain dealings with a company called the New England Worsted Company, as the result of which he claims a balance to be due for the sale of certain wool; that in respect to the said balance, and particularly in regard to the amount of said balance, there has been and is a dispute between himself and the said company, and that in fact no part of the amount so in dispute has been collected; the amount supposed to be due is, as respondent believes, twenty-five hundred dollars, as is by the complainant averred.

Respondent admits that there was a quantity of wool, part of one of said shipments, in his hands; but he says that it has been sold since the filing of the complainant's said bill for the purpose of closing the shipment and with a view of enabling this respondent to state a final account of his business transactions so far as they relate to the two several agreements aforesaid; and this respondent denies that he has unreasonably neglected to collect the said money and to sell said wool.

Respondent, further answering, says that he has not kept any books of account devoted exclusively to the matters appertaining to the aforesaid agreements, or to either of them, but that all the entries relating thereto have been made in his general books of account, in which his business transactions of all kinds are entered, and, as well those in which the complainant has no interest as those in which he has an interest.

94 Respondent further says that the complainant, since his return to the United States, in the month of March, in the year eighteen hundred and fifty-six, has had frequent opportunities to examine the books of the respondent, and to some extent has examined them.

Respondent, further answering, says that a long time since, and according to his best recollection, as long ago as the month of October, in the year eighteen hundred and fifty-six, with the intention and earnest desire of bringing the business under the said agreements to a close, and of having a full and final settlement of all matters respecting the same, he, by his book-keeper, commenced the work of examining his books of account and the items of which said accounts are composed, and of inquiring into the details of the transactions and negotiations to which they severally relate, so far as they have any bearing on, or relation to the business aforesaid, and he has devoted very much time and all the time which he and his said book-keeper could spare consistently with regard to his other business, to the work aforesaid, and that some considerable progress has been made therein; but by reason of the nature and variety of the business which was carried on under the said agreements, the length of time devoted thereto, the fact that in many instances goods were shipped from Valparaiso to other and distant parts, and were often only disposed of after great delay, and his want of information, which was owing partly to the absence of the complainant from the United States at the periods to which said transactions relate, many of the items of which said shipments were made up, requiring, as this respondent on information believes, the presence of the complainant in order the better to understand them, the accounts have not yet been brought into a condition which enables the respondent thereby to disclose the true state of accounts between himself and the complainant in regard to said agreements and the matters under the same, or to furnish accounts suitable to be annexed hereto or filed herewith as a part of his answer.

And respondent, further answering, says that the work of preparing the said accounts in proper form has been very much increased by the fact that the book-keeper, who is now and for several years past has been employed by him, was not in his employment during the period of time covered by the said agreement or either of them.

And this respondent, further answering, says that considerable progress has been made by his book-keeper and by himself, as hereinbefore stated, in the preparation of an account of the business of this respondent in the said two agreements mentioned; that various memoranda and skeleton accounts have been prepared by his said book-keeper; that this respondent has not examined the vouchers, invoices, accounts of sale and entries in relation thereto sufficiently to enable him to determine their accuracy or to ascertain the amount which may be due, if any, to the complainant upon a full and correct statement of the accounts, and whether the sum of eighty thousand dollars, or how
95 much thereof will be due, if anything is due to the complainant,
this respondent is unable to say with certainty. And this respondent further says that he is advised that the complainant is not entitled to the production of the aforesaid imperfect and unexamined skeleton accounts.

And this respondent, further answering, upon the information and advice of counsel, says that he has not and is not, by the said several agreements, or by either of them, under any obligation to render to the complainant, at Valparaiso, any account of the business of this respondent, to which the said several agreements refer. And, for further answer, he says that the books, papers, vouchers, accounts, and correspondence relating to the said business, have been and now are open to the inspection of the complainant, at the counting-room of this respondent in Boston, at any and all reasonable hours, so far as the same relate to the business of this respondent in the said several agreements mentioned.

All which matters and things this respondent is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM W. GODDARD.

CIRCUIT COURT, MASSACHUSETTS DISTRICT,
August 3d, 1857.

Personally appeared the above-named W'm Goddard and made oath that he had read the above answer by him subscribed and knows the contents thereof, and that the statements therein contained, so far as stated of his own knowledge, are true; and, so far as stated on information and belief, he believes the same to be true.

Whereupon the plaintiff moves the court for leave to amend his said bill; which motion is allowed, and the following amendment of bill is filed.

Circuit court of the United States. In equity.

GEORGE J. FOSTER, COMPLAINANT,
vs.
W'M W. GODDARD, RESPONDENT.

And now the said Foster, by leave of court first had and obtained, amends his bill by striking from the third page of said bill the following words: "by whom said merchandise was sold, and the proceeds thereof invested in other goods and merchandise, which were shipped by your orator, and consigned to the said defendant, and at said Boston; that said return cargoes were then sold by said defendant, by whom also books, papers, and original vouchers were kept, showing the exact profit and loss upon each and every such adventure or shipment; but that your orator always sent all his accounts of his sales and management of said business, and of the outward cargoes, and of his purchases of the homeward cargoes, to the said defendant."

96 And inserting in lieu thereof the following words, viz: "With instructions to place the same for sale in the mercantile house of Alsop & Co. That such sales were made by said house, and that return cargoes were purchased by said house, who were paid commission therefor, which return cargoes were sold in the United States by said defendant, by whom books, papers, and vouchers were kept and received, showing, from which can be ascertained, the exact amount of profit and loss on each of said adventures and shipments.

"That the part of said business transacted by said Alsop & Co. was conducted under the general supervision and control of your orator; that inasmuch as the said mercantile house was the channel through which said business was effected, the sales and purchases of cargoes made abroad were entered into the books of said house of Alsop & Co., by whom accounts were regularly furnished, showing their doings in regard to said cargoes and said business, and that your orator always caused said accounts to be forwarded to said defendants, who received the same."

And also by striking out the following words from the second, third, and fourth lines from the bottom of the tenth page of said bill, viz:

"His part of the accounts touching the copartnership business transacted by your orator while absent thereon," and inserting in lieu thereof the words, "the accounts of said house of Alsop & Co., showing the copartnership business transacted under the supervision of your orator through said house."

Also by inserting in the sixth line from the bottom of the eleventh page of said bill, immediately after the words "so to do," the following words, viz: "and your orator shows that while conducting said business under the said several agreements, his expenses of living, which by the terms thereof were to be a charge on said business, greatly exceeded the amounts therefor limited in the said several agreements, by reason whereof your complainant thought it useless to, and did not in fact, keep any account thereof, and the sums so expended by him are charged in the account of Alsop & Co., so transmitted to the defendants.

GEO. J. FOSTER.

EDWARD D. SOHIER,
CHARLES A. WELCH,
Solicitors and of Counsel for Complainant.

Circuit court of the United States, Massachusetts District.

Personally appeared the above-named George J. Foster, and made oath to the truth of the above statements and matters as amended.

Before me, Aug. 13, 1857.

H. W. FULLER, *Clerk.*

97 Afterwards at the same term, to wit, Sept. 5, 1857, the respondent's answer to amendments is filed, as follows:

Circuit court of the United States, Massachusetts district. In equity

GEORGE J. FOSTER, COMPLAINANT,
vs.
W'M W. GODDARD.

Answer of the said William W. Goddard to the amendments of the bill of complaint of the said George J. Foster.

And now the said Goddard, in answer to the first amendment, says he does not admit that the business transacted by Alsop & Co. was under the general supervision and control of the said Foster, but he avers that the same was carried on under the control of this respondent; the said Foster, so far as he rightfully may have given any direction or exercised any control in relation to the said business, acting under the advice and orders of this respondent.

And as to the said second amendment, this respondent answering, does not admit, but denies, any partnership or partnership accounts between himself and the said Foster.

And as to the said third amendment, this respondent answering, says he has no knowledge or information whether the expenses of living of the said Foster at Valparaiso, under the said two several agreements, were more or less than the sums in the said several agreements mentioned, beyond which the said expenses should not be a charge upon the said business, and therefor cannot admit or deny the same.

And this respondent further says that in and by the said several agreements, it became and was the duty of the said Foster to keep an account of any and every expenditure by him made, under the said agreements, and to render an account thereof to this respondent.

And this respondent, further answering, denies that the accounts rendered by Alsop & Co. to this respondent, contain any statement or item showing the expense of the living of the said Foster at Valparaiso, during the continuance of his employment by this respondent, under the said several agreements or either of them.

He admits, as already stated in his answer to the original bill, that the said accounts contain sundry debits to this respondent for cash from time to time paid by them to the said Foster, but they do not show the disposition thereof made by the said Foster.

W'M W. GODDARD.

WATTS & PEABODY,
For Respondents.

DISTRICT OF MASSACHUSETTS, *ss :*

SEPT. 4TH, A. D. 1857.

Then personally appeared the said W'm W. Goddard and made
98 oath that he had read the foregoing answer by him subscribed,
and knew the contents thereof; that the same are true, so far as
they are stated on his knowledge, and that so far as they are stated upon
information and belief, he believes them to be true.

Before me.

E. MERWIN,
U. S. Commissioner.

The plaintiff then filed a general replication, which, by leave of the court, is withdrawn.

Appointment of master.

Circuit court of the United States, Massachusetts district. In equity,
May term, 1857.

GEORGE J. FOSTER
vs.
W'M W. GODDARD.

On reading the pleadings in the above cause, and hearing the counsel of the respective parties, and on consideration thereof, it is ordered that it be referred to Elias Merwin, esq., as a master of this court, to take an account of the dealings and transactions of and between the said parties under the several agreements set forth in the plaintiff's bills, and to state what upon the balance of said accounts shall appear to be due from either party to the other.

And the said master is to make a rest in said accounts, and state whether any and what balance was due from either and which of said parties to the other on the first day of April, A. D. 1850, as well as at the period at which the complainant in his said bill alleges said mutual account to have terminated.

And said master is authorized to state and report to the court any special circumstances needful for explaining said account and his report thereof, and the evidence as to when said mutual account did terminate.

And for the better taking of said accounts and discovering the facts relative thereto, the said parties are required to produce before said master, upon oath, all books, papers, writings, and vouchers in their possession, custody, or power, and to be examined before said master upon oath, either upon interrogatories or viva voce, or by each of said modes, as the said master may direct.

And all equities and further directions are reserved until the coming in of the report.

And the parties are at liberty to apply to the court as occasion may require.

Agreed that the foregoing order pass.

WATTS & PEABODY,
For Respondent.
SOHIER & WELCH, and
S. BARTLETT,
For Plaintiffs.

99 The cause was then continued to the October term, 1857, when, by leave of court, the following amendment to plaintiff's bill is filed. (May 8, 1858.)

Circuit court of the United States. In equity.

GEORGE J. FOSTER, COMPLAINANT,
vs.
W'M W. GODDARD, RESPONDENT.

And now the said plaintiff, by leave of the court first had and obtained, amends his said bill by inserting on the fifth page thereof, in the last line but one of the said page, after the words "having then expressed," the words following, viz :

And your orator further shows to the court that, before the expiration of the agreement, viz, in the summer of the year eighteen hundred and forty-eight, there was fitted out and consigned to your orator in the manner usual, under the said agreement, by the said Goddard, a certain ship, with her cargo, called the Crusader, which said ship sailed from said Boston with her cargo for Valparaiso, as aforesaid, on the twenty-sixth day of August, eighteen hundred and forty-eight. And although the said voyage of said ship, as was well known to the said Goddard and to your orator, could not be wholly completed within the period limited by the said agreement, it was well understood and agreed between them that said inchoate voyage should be deemed to be within said agreement, and that your orator should be interested therein in the same manner as if the same could have been or was to be entirely completed within the time limited by the said agreement for the duration thereof; and the said Foster did render the same services for and in relation to the said ship and her cargo and the return voyage thereof as he rendered and was to render in relation to the other voyages and adventures commenced and completed under the agreement aforesaid.

GEO. J. FOSTER.

EDWARD D. SOHIER,
CHARLES A. WELCH,
Plaintiff's Solicitors.

Circuit court of the United States, Massachusetts district.

Sworn to before me.

H. W. FULLER, *Clerk.*

MAY 8, 1858.

The same was thence continued to the May term of this court, A. D. 1858, when the answer of the respondent to amendment was filed. (May 22, 1858.)

Circuit court of the United States. In equity.

GEORGE J. FOSTER, COMPLAINANT,
vs.
W'M W. GODDARD, RESPONDENT.

And now the said respondent comes, and, for answer, says he admits that before the expiration of said agreement and in the summer of the year eighteen hundred and forty-eight, there was fitted out and consigned to the plaintiff, in the manner usual, under said agreement, by this respondent, a certain ship called the Crusader, with her cargo, consigned to the complainant, which said ship sailed from said Boston with her cargo for Valparaiso on the twenty-sixth day of August, in that year. 100

This respondent does not admit, but denies that it was agreed by the complainant and himself that said voyage should be deemed to be within the said agreement first above mentioned, and that the complainant should be interested therein as set forth by him in the said amendment to said bill of complaint; and as to an understanding of the complainant prior to said voyage, the respondent has no information, knowledge, or belief, and therefore he neither admits nor denies the same; but he denies that he had any understanding with the complainant, as alleged in the bill. And as to the rights of the complainant, if any, in said voyage, the respondent, further answering, says that they depend entirely upon the written contract between the parties, bearing date on the twenty-fourth day of June, in the year eighteen hundred and forty-three. And concerning services rendered by the said Foster in relation to the said ship and cargo, and the return voyage of said ship, as alleged by complainant, if any such were rendered, this respondent has no certain knowledge, and, therefore, neither admits nor denies the same, but leaves the complainant to prove the same as he shall be advised.

This respondent, further answering, says that the said ship called the Crusader, on her said voyage from Boston to Valparaiso, arrived at Valparaiso on the twenty-ninth day of November, in the year eighteen hundred and forty-eight, and not before, and that said Foster left Valparaiso for the United States on the first day of December, then and next ensuing, and without rendering any important service in regard to the said vessel and cargo.

W'M W. GODDARD.

Sworn to before me this 20th day of May, 1858.

A. C. WILMARTH,
Notary Public.

Afterwards, (May 24, 1858,) the plaintiff files his replication.

United States circuit court, Massachusetts district. In equity.

GEORGE J. FOSTER, COMPLAINANT,
vs.
W'M W. GODDARD.

The replication of the said Foster to the answer of the said Goddard.

This repliant, saving to himself all manner of advantage and of exception to the manifold insufficiencies of the said answer and amendments, for replication thereto saith, he will aver and prove his said bill to be true and sufficient in law to be answered unto, and that the answer of said defendant is uncertain, untrue, and insufficient to be 101 replied to by this repliant. Without this, that any other matter or thing in said answer contained, material or effectual in law to be replied unto, confessed, and avoided, traversed and denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

By his solicitors.

EDWARD D. SOHIER.
CHARLES A. WELCH.

Order of reference.

Circuit court of the United States, Massachusetts district, ss. May term, 1858.

GEORGE J. FOSTER
vs.
WILLIAM W. GODDARD.

And now the complainant's bill having been amended, and answer thereto filed, and the complainant's replication filed, on motion of the complainant's counsel, it is ordered and decreed that the amended bill and answer as now filed in this court be submitted to Elias Merwin, esq., the master to whom the cause has heretofore been referred, to state the accounts involved in the cause, with all and the same powers, and in as full and perfect manner and to the same intent and for the same purpose as if the last filed amendment and answer had been introduced into the cause prior to said former order of reference to said master.

And at the same term, to wit, June 2, 1858, the master's report was filed.

Circuit court of the United States, Massachusetts district, ss. In equity.

GEORGE J. FOSTER
vs.
WILLIAM W. GODDARD.

The subscriber, to whom this cause was referred to take an account of the dealings and transactions of and between the parties under the several agreements set forth in the complainant's bill, and to state what balance shall appear to be due from either party to the other, as will more fully appear by the orders of reference, respectfully reports:

In pursuance of an order issued by the master, that the respondent should furnish accounts of debit and credit of all his dealings with the complainant under the two agreements set forth in the bill, the respondent filed the accompanying copies of accounts, designated, respectively, No. 1, No. 1 A, No. 1 B, No. 1 C, No. 1 D, No. 1 E, and "Crusader's 2d voyage, No. 1," under the first agreement; and, No. 2, No. 2 A, No. 2 B, No. 2 C, No. 2 D, and "Harriet Erving, 3d, No. 2," under the second agreement.

In answer to an order to the complainant to file an account of 102 his disbursements for his personal expenses, he filed the accompanying affidavit, setting forth that said expenses exceeded, under the first agreement, the sum of six hundred dollars, and, under the second agreement, the sum of one thousand dollars; that he had no account of the same, and was therefore unable to file any.

To the accounts filed by the respondent as aforesaid, the complainant made the following objections:

Under the first agreement—

1. That said accounts contained no credit of the profits made by Goddard on the sale of a ship called the Valdivia, or Supply, Dec. 7, 1846, nor of the interest thereon.

2. That they contained no credit of the amount of profits made on the second voyage of the ship Crusader, nor of the interest thereon.

3. That from the item in account No. 1 D, charged as balance due from the New England Worsted Company, should be deducted the sum $1,789.89.

4. That the items for store rent, taxes, clerk-hire, and advertising in said accounts are not chargeable as against the complainant.

5. That said accounts should have been made up with annual rests, upon the balance due, under said first agreement to date.

6. The complainant also objected to other items in said accounts, and the same were withdrawn by the respondent, and are so marked by the master.

The respondent, after filing said accounts, asked leave to correct the item of $9,300.16, in general account No. 1, under date of Dec., 1844, debited to the ship Charlotte, by adding thereto the sum of $7,000, making said debit, including difference of interest, $16,675.16, so that in result the complainant, instead of being credited with the sum of 23,000.00, for which the ship Charlotte was sold in February, 1849, would be credited with the sum of $16,000.00, which the respondent claimed was her true value on Oct. 3, 1848, and he claimed that the complainant was to be credited with her value as upon that day, and not with her value in February, 1849, the date of her sale.

Under the second agreement, the complainant objected—

1. That said accounts contained no credit of the profits made on the third voyage of the ship Harriet Erving.

2. That the charges for taxes, store rent, clerk-hire, and advertising, were improper.

3. That said accounts should have been made with annual rests upon the termination of said agreement, to date.

In the course of the hearing, other claims and objections were made by the respective parties, which are duly noticed, and passed upon in the following report:

103 *I. The complainant's claim to a share in the profits of the "Valdivia."*

1. The first disputed item is a claim made by the complainant to a

share in the profits realized by Mr. Goddard upon a sale of the ship Valdivia. This was a new ship, built by Mr. Ewell, under a contract made by him with Mr. Goddard; was launched on the 15th of October, 1846, and was sold by Mr. Goddard to the U. S. Government the 7th Dec., 1846, at a profit. The validity of this claim depends upon the construction to be given to the following clause in the agreement of 1843:

"And, furthermore, said Goddard has the right of purchasing, selling, and chartering the vessels designed for the trade at his option, the loss or profit attendant thereon to be charged or credited in the general account. It is also understood that said Foster's interest of one-tenth is liable to the full extent for all the risks and casualties in the business, attendant upon the goods and vessels."

This vessel was never actually employed in the business of this trade. On the other hand, there is evidence tending to prove that she was originally contracted for by Mr. Goddard, was built, and was designed for this trade; that Mr. Goddard had engaged a part of her outward cargo; that these facts were communicated by him to Mr. Foster; and that, under instructions from him, Mr. Foster had procured a portion of her first return cargo. She was sold, (so far as the evidence shows,) however, before any cargo had been laden on board of her at Boston.

March 17th, 1846, Goddard wrote to Foster: "I have contracted for a new ship of 550 tons, in the hopes of having one that will make her outward passage in sixty-five or seventy days; what shall be her name? I understand that Valdivia, the name of a province," &c.

Again, Aug. 22d, 1846: "Capt. Millet waits for the Valdivia, which will be despatched in November."

Oct. 12th: "The Valdivia will be launched to-morrow, and will be our next ship; she will not, however, sail earlier than the 1st to the 15th Dec., it being impossible to obtain any cotton goods before that time, although engaged some time since."

Oct. 13th, the next day: "Don't sell anything to arrive by the Valdivia."

Jan. 5th: "Doubtless you will be surprised, perhaps disappointed, in seeing this vessel (the Santiago) instead of the new ship, but the truth is, I have been tempted to sell her to our Government for some nine or ten thousand dollars above cost, cash in hand. She is now called the Supply."

It is contended by the respondent that the complainant was only entitled to a share of the profits of such vessels as were actually employed
in the trade, and not of those which might have been designed for
104 the business, but not actually employed in it; that although God-
dard may have intended the Valdivia for this trade, yet that he
abandoned that intention before carrying it into effect, and that the agreement of 1843 did not restrict him from pursuing business on his private account.

This agreement contemplated not only the employment, necessarily, of vessels carrying on this trade, but also, as subservient to the main business, the dealing in vessels to a certain degree, as subjects of trade, and this branch of the business was under the exclusive control of Goddard. It may be true that he was at liberty to pursue other business but none the less for that reason was all that appertained to this agreement a distinct and independent business, and so to be preserved. Whatever act Goddard did, he did it with reference to one business or the other; either for the joint or for his private account. Whatever property was procured by him was procured eo instanti for one business or the other, and thereafter belonged to that business, and its character in this respect could not depend upon any subsequent purpose of Goddard, suggested by the results of the particular adventure. The proper effect, therefore, of the fact that Mr. Goddard was not restricted from other business is, that he was thereby bound still further, if possible, to preserve with the most scrupulous exactness and good faith the two businesses entirely distinct, marked, and unconflicting, so that there should be neither temptation nor opportunity, after having procured a vessel on one account, to subsequently change its destination, according as the adventure promised a profit or a loss. Whatever Goddard did under this agreement was at the common risk and for the common benefit. If in the honest exercise of his discretion he had purchased a vessel for this trade which proved, immediately after the purchase, woolly unfit for the business, and she was sold at a loss, can it be doubted that this loss would have been properly chargable in the general account. On the other hand, if he had purchased or by mutual consent had built a vessel for this trade, and the same had been sold at a profit, before being employed, that profit, as it seems to me, equally belongs to the general account.

If the books of Mr. Goddard had been kept in the manner which Mr. Stevens testified would have been proper, so as to have presented in themselves a full statement and history of this business, they would have contained, I imagine, on one side of the account some charge of every vessel purchased or contracted for and built by Mr. Goddard for the joint trade. In purchasing or contracting for any vessel, he must have acted at the time either for himself solely or for the joint business. If for the joint business, then in books regularly and properly kept the transaction would have immediately appeared on them, and it having once belonged to the joint adventure, and been at the common risk, it is obvious that Goddard could not have subsequently changed the destination of the property so as to have deprived Mr. Foster of his interest therein.

105 The circumstance that no such books were kept, while it may increase the difficulty of proof, cannot alter the principle upon which the account should be settled.

The language of this contract is, that Goddard may purchase, sell, or charter any vessel designed for this trade, and any profit or loss attendant upon such purchase, sale, or charter, is to be credited or charged in the general account. If Goddard purchases or sells any vessel designed for this trade, an interest is expressly given to Foster in the results of that transaction. Whatever is designated for use and sale, and set apart, becomes a part of the common stock.

That this language is here used in its natural and obvious sense, will appear from a reference to the succeeding provision in the agreement, viz:

"The vessels now designed for the trade, are the ship Robin Hood and bark Roscius, and are valued, the Robin Hood at $10,500, cash, at the completion of her last voyage, and the Roscius at $8,000, cash, on the completion of her present voyage."

At this time, the Roscius so far from being actually emyloyed in the joint business was then absent upon a different voyage. She was, however, agreed upon and designated for this trade and her value was fixed upon the completion of her then present voyage. Suppose that immediately upon its completion and before she was actually employed in this trade, Goddard, acting under the authority given in the agreement, to sell at his option any vessel designed for this trade, had, in good faith and for what to him seemed sufficient reason, sold this vessel either at a profit or a loss, can it be doubted that such profit or loss would have been chargeable in the general account?

It seems to me, therefore, upon every view of this contract, that the construction for which the respondent contends that Foster had an interest only in the vessels actually employed, cannot be maintained.

2. The remaining question under this item is, what is the proper sum to be credited as the profit made on the sale of the Valdivia?

Profits of the Valdivia.

It is agreed that paper H, filed in the case, states a proper account of the profit on the sale of the Valdivia, except that the defendant asks to add two items to the Dr. side of the account.

The first item is $50 for his expenses to Medford in overseeing the building of the vessel.

The other is the sum of $751.33 which respondent claims he allowed to Euell, the builder of the vessel, for extra work expended thereon.

Upon consideration of the evidence now before the master, I am of the opinion that the respondent should be credited with these two items.

106 *Crusader's second voyage.*

3. Mr. Foster claimed, in the next place, that he should be credited with a share of the profits of the Crusader's second voyage.

The Crusader sailed from Boston, August 26, 1848, arrived at Valparaiso, November 29th, 1848, sailed thence for Coquimbo, December 30th, 1848, and from Coquimbo for Boston, January 11th, 1849.

Foster's engagement was for the term of five years after his arrival in Valparaiso, which expired October 3, 1848; he was to receive one-tenth of the profits of the business for the same period, or the sum of $5,000 at his election. He, in fact, remained in Valparaiso until November 30, or December 1st, 1848, employed, as he claims, in the business of Goddard.

The agreement was for a fixed and definite period, and it makes no provision for compensatory services rendered after its expiration. If Foster rendered any services after October 3, 1848, he did not render them under this agreement, for it expired by an express limitation at that date.

It seems to me, therefore, that he cannot claim, by virtue of this agreement, an interest in a voyage which was not completed until more than three months after October 3, 1848, as compensation for any services rendered by him after that date.

It was competent, however, for these parties to make an additional agreement covering a period not embraced within the original contract, and the evidence clearly shows, I think, that they have so done.

It must be conceded that Goddard had no right to call upon Foster for his services for a single day beyond October 3, much less for a period of two month', neither is it very probable that Foster would have gratuitously rendered them.

Upon this point I find, as matter of fact, that Goddard did request and did receive of Foster the benefit of his services after October 3, 1848, and particularly in reference to the second voyage of the Crusader, upon the agreement, if not express, yet clearly implied and well understood, that Foster was to share in the profits of this voyage.

Without going minutely into the evidence, the conduct and correspondence of the parties, as it seems to me, are inconsistent with any other conclusion; beginning with the letters of Goddard, of July 14th, and August 18th, 1848, which, he must have known, could not reach Foster until after October 3, 1848, wherein he gives information of this contemplated voyage, with notes of the cargo, and his directions as to its disposal, accompanied with the request that Foster should give the vessel the speediest despatch, and ending with his letter to Messrs. Alsop & Co., of May 12, 1849, in which he impliedly admits that the Crusader's second voyage was embraced in the first arrangement with Foster.

107 The letters to which I particularly refer are those of Goddard to Foster, of July 14th, August 18th, August 25th, 1848; May 12th, 1849; and of Foster to Goddard of August 29th, September 29th, October 27th, and October 28th, 1848.

In this view I consider it immaterial that Foster did not remain in Valparaiso to complete the sale of the cargo of the Crusader. It could not have been expected that he would. According to the usual course of the business it was evident that some portion of the cargo would remain to be sold after the period fixed by Foster for his departure, and no dissent was expressed by Goddard to this course then or subsequently—at least none as late as May 12, 1849. It is now too late to claim that Foster thereby forfeited his right to share in these profits.

But is the complainant entitled to an account of these profits under the present pleadings? The bill is framed entirely on the written agreement of 1843. According to the opinion already expressed, that agreement does not cover the voyage in question. It was competent for the parties to make an additional agreement, and they have done so; but I cannot acquiesce in the suggestion of complainant's counsel that it was competent for the parties subsequently to agree that a certain voyage begun before the agreement ended, should be deemed to be within the original contract, which would not have been otherwise embraced in its terms, and thus give to the contract a construction and effect which, by law, it would not have.

In my opinion, therefore, an amendment stating the additional agreement, and claiming an account under that, will be necessary.

IV. The amount to be credited for the sale of the Charlotte.

The Charlotte was sold by Goddard, in February, 1849, for the sum of $23,000. In the first account filed by him in this case, he credited the business with that sum, and charged commissions on that sum for effecting the sale.

The respondent now asks to reduce that credit to the sum of $16,000, which, he alleges, was the true value of the vessel on October 3d, 1848, and that Foster only is entitled to a credit of her value upon that day when the agreement of 1843 expired.

Very nice and difficult questions might arise under this agreement as to the proper mode of arriving at the value of the property, especially when, as in this instance, the property happened to be at sea on the third of October, 1848. But these I have not found it necessary to consider in arriving at the conclusion upon the question now before us.

On October 3d, 1848, the Charlotte was upon her fourth voyage, having left Valparaiso, September 9th, and arriving in Boston, December 5, 1848.

In the accounts filed by the respondent in this case, he has credited

Foster with a share (one-tenth) of the profits of this voyage. It 108 has thus been treated by the respondent as embraced within the agreement, although the voyage did not terminate until December 5, 1848. I can draw no other inference from the fact that the respondent himself has thus credited Foster with the profits of this voyage, than that, by common consent, this voyage was taken and agreed to be within the first agreement.

On the 3d of October, the Charlotte was at sea, engaged in this voyage for the common benefit, and her service was not ended until December. And therefore, until the completion of that voyage thus prosecuted for the joint benefit, she was, by the express term of the agreement, at the joint risk. From this consideration, it seems to me clear that the period for her valuation must be deemed to have been postponed until the termination of this voyage. Foster having shared in the profits of this voyage could not have claimed a valuation of the vessel as of October 3d, if subsequently during the prosecution of the voyage her value had been diminished, as in the ordinary course of things it would have been. Such a claim would have been obviously unjust and untenable. But results cannot alter the principle. This fourth voyage having been accepted by all parties as within the agreement, the vessel was therefore, during the voyage, at the common risk, and the proper period for her valuation was at its termination. If her value had diminished between October 3d and the termination of the voyage, such diminution would clearly have been a loss chargeable to the general account.

The Charlotte arrived the 5th, and was probably discharged about the 20th of December. According to the testimony of Mr. Cheney, the demand for California vessels begun in December, 1848, and he advertised one about the tenth of December. The Charlotte was sold in February, 1849. There is no evidence before me that her value on December 5th or 20th was not about the same as in the succeeding February. Goddard credited Foster with the amount received on the sale in February, and charged commissions thereon. If this had been done under any mistake of fact, it might be unjust to hold him to it. But he knew then, quite as well as he can know now, and perhaps much better, for the transaction was then fresh, how much the price of this vessel was affected by the demand for California vessels, and how her value then compared with her value in December.

I am of the opinion, therefore, that no sufficient reason has been shown for disregarding the credit originally given by Goddard for the sale of the Charlotte, and that this item must stand as originally credited in the first account filed by him.

V. New England Worsted Co.'s account, ($1,789.89.)

The respondent, in his additional account No. 1 D, has charged the general account with a balance of account due, from the New England Worsted Company, under date February 28, 1848, $2,173.04.

The complainant objects to this item, and claims that there 109 should be deducted from it the sum of $1,789.89, which, as he avers, the New England Worsted Company were willing to pay, and which Goddard was bound to receive.

The facts proved by Mr. Stevens, the clerk of Mr. Goddard, are as follows:

The company were charged, on the books of Goddard, with the sum of $2,173.04 on the balance of an account due for wool; but the amount due was in dispute between them. In 1850 or 1851, the company tendered in payment about $1,500, which Goddard declined to receive. Nothing further was done by either party, until January, 1857, after the claim had been outlawed three years, when the company offered the sum of $1,789.89, but Mr. Goddard refused to receive it, and also declined to permit Foster to receive his proportion of that sum.

It is contended by the respondent that he had a right to conduct his own business, in his own way, being responsible to Foster only for any want of good faith, and that he was neither bound to accept a sum less than what he believed to be due, nor to institute a suit to recover what he claimed, and that if any loss has thereby occurred it is properly chargeable to the business.

The management of the business, including the collection of the accounts, was under the absolute control of Goddard, and in conducting it he was responsible, I think, only for the exercise of good faith and ordinary diligence. He was not bound to accept the sum less than what he believed to be due, and if he had instituted a suit to recover the full amount Foster would have undoubtedly been bound by the result. But was he at liberty to do neither? As between parties situated as were these, the authorized duty to collect being vested solely in one, and the amount of the compensation of the other depending, in a measure, upon the manner in which that duty should be performed, was it reasonable prudence or diligence for Mr. Goddard to decline either to receive what the debtor offered to pay, or to enforce the payment of what he himself claimed to be due? It is well settled that if executors or trustees allow a debt against a solvent debtor to become outlawed, they are chargeable with the amount. (Hill on Trustees, 649, 650.) I think the same rule should apply to this case.

Moreover, in January, 1857, when the New England Worsted Company offered to pay the sum of $1,789.89, Goddard had no legal claim whatever upon them, for he had already allowed his right to recover the original demand, or any sum, to be barred by the statute of limitations for three years. If, under these circumstances, he chose to decline the sum of $1,789.89, he voluntarily subjected himself to the loss, but he could not, in good faith, compel Mr. Foster, against his expostulations, to share it with him.

110 In my opinion, therefore, the sum of $1,789.89 should be deducted from the item in dispute.

VI. Rent, taxes, clerk-hire, &c.

The respondent has charged in his account, under both agreements, certain items for store rent, taxes, clerk-hire, and advertising, paid by him, as he claims, on account of the joint business, and which should be allowed. These items, under the first agreement, are contained in account No. 1 B, and under the second agreement, in account, No. 2 A.

The complainant disputes these charges, and the first question is, whether they are to be considered in ascertaining Foster's share of the profits. It has not been very strenuously contested that these expenses are provided for in the second agreement; and it seems to me clear that under that agreement, all sums necessarily expended by Mr. Goddard for store rent, clerk-hire, or advertising, in conducting the business in the ordinary mode, and in paying taxes assessed upon the property employed in this business, are proper charges in this account.

How far these charges are maintainable under the first agreement, I have found to be a question of much more difficulty. The provision is as follows:

"In consideration of which said Goddard engages that said Foster shall, at the expiration of five years, be entitled to one-tenth of the nett profits of his business in that trade, after deducting interest at the rate of six per cent. per annum on the capital invested, and all costs and expenses of whatever name and nature that may be incurred, both at home and abroad, in sailing, victualling, manning, keeping in repair the vessels employed, including all port charges, as also the actual expenses that may appertain to the goods themselves, including the cost of said Foster's living, which is not to exceed six hundred dollars per annum."

The term "nett profits," with no qualification added, signifies the balance which shall remain after deducting all costs and expenses attending the business. But the difficulty here is, that the parties have added a qualification, and one that, after much consideration, I do not feel at liberty to reject. It is to be observed that they did not intend to form a partnership inter sese, and it was entirely competent for them to agree upon what basis Foster's proportion of the profits should be calculated. They have, as it seems to me, expressly provided that so far as his share is concerned, the profits are to be ascertained by deducting—

1st. The interest on the capital invested, (not the interest and taxes.)

2d. All costs and expenses of sailing, victualling, manning, or repairing the vessels employed, including port charges.

3d. The actual expenses that may appertain to the goods themselves.

111 4th. The cost of said Foster's living, not exceeding $600 per annum, and that no expense which does not belong to one or other of these clauses can be included.

The items in dispute clearly do not come under first, second, or fourth class, and if provided for at all, it must be in the third, viz: also the actual expenses that may appertain to the goods themselves. Whatever by liberal construction is comprehended within this description, should be allowed. All expenses incurred in the business bear some relation, in one sense, to the goods and merchandise which were the subjects of traffic. I do not think, however, that this is the true meaning or intent of the clause, but that it refers to such expenses as were peculiar to the goods themselves, and were directly bestowed upon them, such as their cost, insurance, freight, storage, and the like, in distinction from the expenses attending the conducting of the business generally. The pointed and restricted language of this clause, and the connection in which it is found, forbid, as it seems to me, any other construction. The expense of Mr. Foster's living is particularly specified as included, indicating most significantly that the expenses attending any other clerk or agent were not to be included.

Under this view, I incline to the opinion and do report, that the charges for clerk-hire, for taxes on the capital employed, and for advertising the business generally, ought not to be allowed.

As to store rent, so far as the store was procured or occupied for the storage of the goods, the charge is proper, but beyond this it must be disallowed.

VII. The profits of third voyage of the Harriet Irving.

The next item in dispute arises under the second agreement between these parties, and is a claim made by Foster to share in the profits of the third voyage of the Harriet Erving.

The H. Erving sailed from Boston on this voyage August 21, 1850, arrived at Valparaiso December 8th, 1850, and sailed thence for Coquimbo, Talcahuana, and Boston, December 27th, 1850.

The agreement of 1849 provides that Foster may terminate the engagement at any time on notice, giving Goddard the benefit of his services for any voyage commenced before the receipt of the notice, and that Goddard may immediately terminate it at any time.

There is nothing, however, in the agreement itself, nor in the relation of the parties, nor in the nature of the business, to render it unlawful or improbable that the parties should agree upon some certain and distant period for the termination of their engagement.

Upon February 22, 1850, Foster wrote to Goddard as follows: "After a great deal of reflection upon the subject, I have concluded to join the house of Alsop & Co. on the first of January, 1851. I will manage your business as usual until the thirty-first day of December, which will afford you ample time to make your arrangements for sending some one out, if you be so inclined."

112 To this Goddard replied on the thirteenth of April, as follows: "I am very glad to learn your decision to join the house, it being what I would have advised for your own interest. Your wishes will be complied with as speedily as possible," (referring to a request for an account.)

It is contended by the respondent that upon the receipt by him in April, of Foster's letter of February 22, their relations as to any future business immediately terminated; that if Foster rendered any services pertaining to business initiated after April 13th, they were voluntary, and that his residence in Valparaiso from that period to January 1, 1851, was for the purpose of completing the business already begun and in which he was interested.

The notice which Foster gave in his letter of February 22, was that he intended to join the house of Alsop & Co. on January 1, 1851, and that he would manage the respondent's business to December 31, 1850. It signified no design or desire to withdraw from the respondent's business upon the day that it might be received, nor at any period earlier than the thirty-first of December. On the contrary, he expressly says, "I will manage your business until December 31st."

Mr. Goddard was at liberty to accept or reject this notice, or to terminate the agreement at once by a notice from himself. He, however, assented to this notice, neither then or subsequently ever intimated a dissent, but replied that he was glad to learn of Foster's decision, it being what he would have himself advised. It seems to me, therefore, to have been distinctly understood and agreed that Foster was to continue the management of Goddard's business until December 31st.

Upon what terms was he to manage it? He said "as usual." "I will manage your business as usual." The respondent contends that this meant that Foster was to perform the labor, but not receive the compensation; that Goddard was to have the benefit of his services, but Foster is not to have any share in the profits.

This clearly is not the natural meaning of the language, nor is such an arrangement very just or equal, or one which a person would be apt to make. When Foster gave notice of his desire to dissolve his connection with Goddard at a future day, then some ten months distant, and that till then he would manage Goddard's business as usual, I cannot doubt that he meant and was understood to mean that the business was to be conducted, (as it had been,) under the contract then subsisting between them, and upon the terms therein stated.

Foster did continue to devote himself exclusively to Goddard's business until January 1, 1851.

Their correspondence during this period shows that they were both proceeding on the understanding that the agreement of 1849 was still in force, quite as distinctly as that of any previous period, and their entire conduct was consistent only with that hypothesis. The
113 offers by Foster to write occasionally a private letter, and to aid any agent that Goddard might send out, and also his request that Goddard should give him certain discretionary orders in case no agent was sent, all referred to what Foster proposed to do after he should have become a member of the firm of Alsop & Co.

In addition to the portions of the correspondence referred to at the hearing, a letter from Goddard to Foster of September 9, 1850, seems to have an important bearing upon the question whether Foster was then in the service of Goddard under the contract, bound to transact such business as Goddard should direct, or was merely engaged in closing up the old business, and that beyond this, anything he might do was voluntary or gratuitous. In this letter, after first expressing his disappointment that some favorable opportunity for making shipments from the coast of California had not been availed of, Mr. Goddard proceeds to say: "That the like may never happen again, (should such a chance ever occur,) I take the opportunity of expressing my desire that you will hereafter embrace all good opportunities by shipping our own merchandise, or (here follows the most material clause,) purchasing of others, where it seems an object, as was understood between ourselves when last you were in the States."

Is this language, in this requisition, made in September, that Foster should now embark is new adventures by the purchase of goods for shipment, consistent with the respondent's present position that, as long before as April 13th, Foster's engagement to him had been terminated?

Again, the agreement under which Foster returned the second time to Valparaiso was made May 7, 1849. From that date to April 13, 1850, when, as the respondent contends, the agreement terminated, was a period of about eleven months, and from April 13 to January 1, 1850, about nine months. The Crusader sailed on her fourth voyage from Boston as early as February 27th, 1850, and arrived at Valparaiso May 14th, and sailed thence for Boston, June 10th, 1850.

Is it very probable or reasonable that for nearly one-half of the whole period of twenty months between May, 1849, the date of agreement, and December, 31, 1850, when Foster joined the house of Alsop & Co., he was voluntarily and without compensation devoting himself exclusively to the business of the respondent, with the exception of such services as might be necessary in completing the sales by the Crusader?

Coming more directly to the item in question, the evidence has satisfied me that the third voyage of the Harriet Erving was considered by both parties a joint adventure under the agreement of 1849. Up to the time of her sailing from Valparaiso for Boston, on the 27th December, I do not find that Mr. Foster's services bestowed upon the business of this voyage differ in nature or degree from those which he gave to any previous voyage confessedly within the contract. Mr. Goddard
114 had no other agent at Valparaiso. Whatever was done was done by Mr. Foster, and there is no complaint that whatever was necessary and proper was not done by him. The correspondence and the testi-

mony of Capt. Spavin shows that he procured and gave all necessary directions in reference to the return cargo. It is said, however, by the respondent that Foster did not accompany the ship to Coquimbo, where she went to take in copper, as he was bound to do, if acting under the agreement, he having written in June 26, 1846, "I shall in all cases go to Coquimbo, as I saw when I was there in the Charlotte that they were not to be trusted." This, at the most, was but the expression of his intention as to the future in reference to a matter in which after all he was to exercise his discretion as the case arose. Capt. Spavin has testified that in this instance it would have been of no advantage for Foster to have accompanied him to Coquimbo. There is no evidence in the case as to what Foster's practice in this respect had been, but I infer from his letter to Mr. Goddard of June 29, 1850, that he did not accompany the Crusader to Coquimbo upon the voyage immediately preceding the one in dispute. The Crusader, Capt. Miller, sailed from Valparaiso for Coquimbo, June 10th, and upon June 29th Foster thus writes at Valparaiso to Goddard: "When the Crusader arrived in Coquimbo, they were beating the last of the goat-skins, and some 250 skins were wormed, and Muller writes me that 'my skins' were badly eaten, &c."

However this may be, it was necessarily within his honest discretion whether to go or not in any given case; and if as the respondent contends he had agreed to conduct respondent's business in the usual manner but gratuitously, he was none the less bound to go, if it was necessary or usual so to do. This circumstance, therefore, does not seem to be of much importance in settling this question.

But it is also said by the respondent that the sales of this cargo were not completed until long after January 1, 1851; that they were made by Alsop & Co. after Foster became a member of that firm; that one of its articles was that no partner should be interested in any other business; and that Foster as such partner received his share of the commissions upon these identical sales. It is argued that Foster never had any interest in this voyage, or if he had, that he forfeited the same, because he was entitled only to a share of the profits of such business as he should conduct to completion. These suggestions deserved, and I have endeavored to give them, the most careful consideration. The duties which Foster was to perform under the agreement are thus stated in the agreement itself:

"That said Foster engages to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and in California, exclusively to the management of all said Goddard's business in those countries, such as the sale and purchase of merchandise and any other property, collecting freight-moneys, procuring freights and consignments of goods, eliciting
115 orders for the purchase and shipment of property, investing money,
drawing and negotiating bills of exchange, and forwarding all the information that can be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard, in accordance with his instructions and best interests, which he is also to care for and protect from impositions, unjust charges, and also extravagant expenditures of the ship-masters, to the best of his ability."

It is also agreed that according to the arranged course of business, the merchandise shipped by Goddard to Valparaiso for sale was placed in the house of Alsop & Co., who made the sales upon a guaranty commission, with the assistance and under the general control of Foster, who acted under instructions from Goddard. It thus appears that while aiding in the sales of the outward cargoes formed a material, it by no means constituted the main, part of the duties devolving upon Mr. Foster under the agreement.

The evidence very fully shows that it was not the habit nor according to the intention of these parties to force immediate sales of the entire cargoes, either by auction or otherwise. So that although the larger portion of each cargo was generally disposed of within a few months—often a few days—after its arrival, yet in most, if not in all, cases some portion of it remained undisposed of for one, two, or even three years. It must therefore have been perfectly well understood, both by Goddard and Foster, that whenever this agreement should be terminated, more or less would remain to be done in disposing of the outward cargoes.

Mr. Goddard in his letter of March 18, 1846, wrote thus: "Do not, however, suffer our goods to be forced upon people at a sacrifice. My object is to supply the market at the highest point, and deeply mortified should I be to learn that Mr. Muller had afterwards obtained better prices." The business seems to have been conducted subsequently in accordance with these instructions. Whether Goddard under any circumstances, after the termination of the agreement upon notice, could have required Foster to remain in Valparaiso and devote himself to the exclusion of all other business, for one, two, or more years, as the case might be, in disposing of the residues of cargoes at such prices as Goddard might prescribe, upon pain of forfeiting all his interest in such cargoes, may admit of grave doubt. Goddard might perhaps reasonably require that he should have the benefit of Foster's services in substantially disposing any residues of cargoes, and that Foster should not engage in any other business which would conflict with his duty in this respect. Foster was indeed bound to conduct to completion the business of this voyage by superintending the sale of the cargo, but their relations having terminated in all other respects, it is difficult to perceive why that duty might not have been fully performed by him in letter and spirit, although he had become, without the assent of Goddard, a member of the house of Alsop & Co., or of some other firm. What remained for Foster to do under this agreement was this: to aid and
116 superintend Alsop & Co. in effecting sale of the residue of the
cargo. What Goddard had a right to require was, that Foster should perform this service faithfully, and that he should enter into no engagements that would be inconsistent with its performance; and therefore it is that I do not perceive why the circumstance of Foster's joining a mercantile house after the termination of his agreement with Goddard, although before the last cargo was entirely disposed of, would necessarily involve a violation of his agreement or a forfeiture of his rights.

If Goddard could have exacted more than this, it certainly was not practically necessary for the protection of his interest, and it is not strange that he should have waived it. That he did waive any such right, if it existed, is, I think, clearly proved.

Upon 13th April, 1850, the third voyage of the Harriet Erving had been projected, and Goddard must have known then, as well as in June, July, and August, during which months we have much correspondence relating to this voyage, that according to all former experience, some portion of her outward cargo would remain to be sold after December 31, 1850.

Knowing this, on the 13th of April, in reply to Foster's letter of February 22, announcing his intention to terminate the agreement January 1, 1851, and to then join the house of Alsop & Co., he not only assented to this course but warmly approved of it. After this expression of assent it was that the voyage in question was undertaken, and most of Foster's services in reference to it were rendered.

Let it be observed that under the agreement of 1849, then subsisting, Foster could be called upon to transact no business of which he was not to share the profits. He was called upon by Goddard to transact this business, and he did it. I think that the cordial assent which Goddard gave on April 13th to Foster's joining the house of Alsop & Co. January 1, 1851, fairly carried with it an assent that he might, after becoming a member of that firm, complete what Goddard must have anticipated would remain to be done under this voyage. It is now too late for him to object, especially, as after giving that assent, he required and accepted the services of Foster as to this voyage—services which Foster was not bound to render, and which Goddard could not require except upon the agreement that Foster was to share in the profits. The argument pressed against Foster's right to share in the profits of the Harriet Erving applies as well to every preceding voyage, for the sales of none of them were completed on January 1, 1851, when he joined the house of Alsop & Co.

But the same answer applies to all—either, 1st. That after the termination of the agreement by notice, Foster was at liberty to engage in other business, provided that he, at the same time, faithfully performed what remained for him to do in completing the sale of the residues of cargoes; or,

2d. If the agreement authorized Goddard to require of Foster
117 that he should abstain from all other business until the sales of all residues of cargoes were absolutely completed, yet that he waived this harsh and oppressive privilege, and consented to Foster's joining the house of Alsop & Co.

As to the suggestion that Foster, after becoming a member of the firm of Alsop & Co., was not at liberty to engage in other business, that would seem to be a matter between him and his partners rather than Goddard; but a complete answer to it, as well as a sufficient reason for Goddard's ready assent to the arrangement, are found in the previous connection that had existed between all these parties in this business, and in the fact that, in effecting the best sales possible of this cargo, their interests were identical.

VIII. Interest, with annual rests.

The complainant contends that he is entitled to interest, with annual rests, upon the balance which was due him under the first agreement and which was left in Goddard's hands as a loan; and also to interest, with annual rests, upon the balance due him under the second agreement from the date of its termination.

1st. In support of the first claim, the complainant introduced the evidence of two witnesses, tending to prove, to some extent, the existence of a custom among merchants in Boston to make annual rests in their accounts; and upon money deposited with them as a loan for an indefinite period, to allow compound interest. But in this case the rights of the parties do not depend upon any implied understanding resulting from usage. They have made their own contract, a written contrrct, and evidence of custom is not competent to vary it.

The agreement of May 7th, 1849, provided as follows: "It is understood that said Foster is to leave in hands of said Goddard, bearing interest, what fund he may have, less two thousand dollars," &c. A loan in express terms upon "interest," and "bearing interest," is a loan upon simple interest.

The language is unequivocal, and its meaning well settled, and the authorities are clear, that usage, while it may explain what is doubtful or technical, cannot contradict or vary the plain and express provisions of a written contract. (See schooner Reeside, 2 Sumn., 567.)

Moreover, it is very doubtful how far the law would give effect to a usage for the allowance of compound interest. The settled doctrine seems to be, that if parties have adjusted an account upon the principle of annual rests, computing interest upon interest, and there has been an express promise to pay the balance, an action will lie to recover it; but that compound interest cannot be recovered by virtue of an antecedent promise to pay it. (Wilcox vs. Howland, 23 Pick., 167; Bevan, ex parte, 9 Vesey, 222, and note; Chambers vs. Goldwin, 9 Ves., 271; Hastings vs. Uriwate, 8 Mass. 455; Von Henrest vs. Porter, 11 Met., 210.)

2d. Foster also claims that he is entitled to an account of the
118 balance due him, under the second agreement, with annual rests,
from its terminaton, on the ground that Goddard wil'fully neglected and refused to account for and pay over the balance due and has employed the same to his own profit, in the prosecution of his business. He seeks to do this by analogy to those cases in which courts of equity have charged trustees with compound interest, as a penalty for misconduct in dealing with the trust-fund.

The evidence, consisting chiefly in the correspondence, abundantly proves that Mr. Foster frequently and most urgently requested an account from Goddard, that Goddard promised to render one, but that, wil'fully or otherwise, he failed so to do.

Delay to render an account, or to pay a balance, one however protracted or however unjust, does not, of itself, entitle a creditor to recover compound interest. There must be another element in the case, and after a careful examination of the authorities I do not think that this is one to which the doctrine of annual rests can be applied. (Hill on Trustees, 530 to 534, note; Robinson vs. Robinson, 9 E. L. and E., 70; Jones vs. Foxhall, 13 E. L. and E., 142.)

In this case, as it seems to me, the relation of the parties, upon the termination of their agreement, was that of debtor and creditor rather than trustee cestui qui trust. Foster was undoubtedly entitled to an account and to the payment of his share of the profits. But there were no specific funds in the hands of Goddard, belonging to Foster, as in the case of trustees holding trust-funds. Foster's right was to receive from Goddard, a sum amounting to one-fourth of the profits earned, as compensation for his services. And therefore, as it seems to me, there has been in this case no other mingling or misapplication of funds than there is in every other where a debtor retains and uses money which he should apply to the payment of his debts.

Mode of making up the accounts, &c.

The respondent claims that the accounts are to be made up as cash on the third day of October, 1848, the day when the first agreement terminated, and on the first day of April, 1850, or the first of January, 1851, according as it may be determined upon which of said days the second contract terminated.

Accordingly, to accomplish this, in crediting the account with the outstanding claims due under the two contracts, but running to maturity, he proposes to deduct the amount of discount necessary to make them equivalent to cash on the third of October, 1848, and April 1, 1850, or January 1, 1851, as the case may be, and then to charge the account with interest, ever afterwards on such discount, as if the cash had actually been paid by him. No such discounting of the claims for cash actually occurred.

In my opinion this is not the proper mode of making up the accounts, for two reasons:

119 1st. The contracts do not provide for this mode of accounting and settlement, but, as it seems to me, contemplate the contrary.

It is very true that Foster's interest in any future business was to terminate under each contract on a day certain; (under the first, on a day fixed in the contract itself, and under the second on a day to be determined by notice;) yet it by no means follows that either party had the right to exact of the other, upon the determination of the contracts, that all outstanding claims not then payable were to be assumed as cash, thus making one a guarantor to the other, and that a settlement was to follow upon that basis.

If Goddard may now make up the account on that theory, then certainly Foster, on the days when these contracts severally terminated, had the right to require that Goddard should assume the risk that all debts due to the concern, amounting, as it is said, in the whole to over four hundred thousand dollars, ($400,000.00,) would be paid, and he was then entitled to an absolute credit for these sums, deducting the discount. So that if every dollar had been lost, or uncollectable, Foster would still have been credited with the full amount. The propositions cannot be dissevered. If Goddard may now assume that he took this risk, then certainly Foster could have required him to take it. But the written contracts, as well as the conduct of the parties, contradict this view. Foster was to receive a certain share of the profits of this business, not of the assumed or conjectured, but of the actual profits. Profits are made up of what is received, and not of what is lost. Moreover, it is expressly provided that Foster's interest is subjected to all the risks and casualties of the business, and all losses attendant thereon.

This is clearly repugnant to the idea that Goddard was to guarantee him against any loss on the outstanding credits due the business by assuming them as so much cash.

The second contract does indeed provide, as argued by respondent's counsel, that "Foster is to leave in the hands of said Goddard, bearing interest, what funds he may have, less $2,000."

This is an agreement that Goddard shall retain, paying interest, what funds he may have of Foster's—meaning, undoubtedly, the funds accruing under the first agreement, although not so expressly stated. Still, what Goddard was to retain and pay interest upon was the actual amount of funds in his hands belonging to Foster. I cannot find in this any evidence that an arbitrary and unequal method was to be adopted for fixing the amount of those funds and that it was not to be determined by the actual fact and result.

This view is, moreover, inconsistent with one which has been previously taken during this hearing. One item in dispute has been a charge of some $2,100, made by Goddard for a balance of account due from the N. E. Worsted Co., which he failed to collect. That charge, to the extent of $1,789.89, was resisted or disallowed, not for reasons affecting the present question, but for the reason that Goddard might and ought to have collected that amount. The balance of that item now stands to his credit. If the respondent's 120 present view is correct, no such charge should have been made or could be maintained.

2. In the second place, if Goddard had the right, or was bound, to assume and to give credit to the concern for all outstanding claims, as cash on the day when each contract terminated, and to settle them with Foster on that basis, he did not do it, but refused so to do; he advanced no money; he discounted no credits. Having refused or neglected to come to an account until all the claims had matured, and until the filing of this bill, I do not perceive upon what equitable or legal principle he can now assume that he has done what he refused to do, or can claim the same benefit which he might have derived from doing it.

The period to which the account must be made up, under both contracts, is the filing of the bill.

II. The next question is, as to the amount of interest to be credited on the funds collected by Alsop & Co. after the termination of the contracts, while remaining in their hands.

Upon the expiration of each contract, certain sums were due for goods already sold, and some goods also were on hand, which were subsequently sold, and the proceeds of both collected by Alsop & Co. On these sums, while in their hands, they allowed interest in account at a certain rate.

The usual, perhaps the invariable, mode of remittance was not by bill of exchange, but the proceeds of the outward cargoes were invested in the purchase of return cargoes, and the remittances were made in this way every three or four months. Foster claims that while these funds were thus in the hands of Alsop & Co., awaiting remittance, the joint account should be credited with the rate of interest actually allowed thereon by Alsop & Co.

This depends upon the question, to what account these funds belonged, and at whose risk they were, during this interval?

These funds were the proceeds of the joint goods, and though actually collected by Alsop & Co. after the termination of the contracts, none the less belonged to the joint adventure, and were at its risk, until they came to the possession of Goddard. When did they come into his possession?

If Alsop & Co., at Valparaiso, were Goddard, or can be viewed as such, then as soon as these funds came into their hands they were received by Goddard and he was immediately chargeable therewith. But Alsop & Co. were not Goddard, nor can they be considered as identical with him. If Alsop & Co., after collecting these funds, had failed, before remitting them, or before an opportunity had occurred for withdrawing them from their hands, it would, I think, be difficult to maintain that, as between Goddard and Foster, Alsop & Co. were identical with Goddard, and that the collection by them at Valparaiso of these balances was equivalent to the actual receipt of them by him. It
121 would be difficult, I think impossible, to maintain that funds which Goddard should thus fail to realize, without fault or neglect of his, should still be charged against him in the joint account as so much actually received. No; the business of Alsop & Co. was to collect these funds and remit while the funds were in their hands for that purpose. Upon every principle they were at the joint risk.

If the ordinary mode of remittance by bills of exchange had been pursued, is it not clear that the funds would have been at the joint risk until actually received by Goddard by the payment of the bills? Then, for the first time, would they have come into his possession, actual or implied. When thus received, they would have been his undoubtedly, as argued by the defendant, to invest or dispose of as he saw fit, giving the joint account credit for the same.

This mode was not adopted. Instead of purchasing and remitting by bills of exchange, these funds were invested in return cargoes, purchased on account and for the sole benefit of Goddard. And to this mode of proceeding the evidence furnishes clear proof of an implied assent by Foster, if any assent were necessary. By this application of the funds there was a distinct appropriation of them by Goddard, which amounted to a payment to him, and from that period, as between himself and Foster, he was chargeable with the same. But until then they were at the joint risk, and are therefore to be credited with such interest as Alsop & Co. actually allowed thereon.

III. The remaining question is, at what sum is the Harriet Erving to be charged in the account, and at what date?

The defendant contends that she is to be charged at her original cost, with interest added to that sum from November, 1848, the date of her completion. But this, as it seems to me, is settled by the contract, which expressly says that she is to be charged at the cost of construction and equipment. She is to be charged, whenever the proper time for that may be, at her cost, abating nothing for her previous use. This excludes the idea of any addition to that sum for interest or otherwise. The parties did provide that no abatement from her cost was to be made on account of her previous use. If it had also been their intention that interest was to be added to that cost, it is difficult to suppose that they would not have provided accordingly.

Where, then, is this vessel to be charged in the account—on the seventh of May, 1849, the date of the contract, or on the completion of the voyage in which she was engaged on Goddard's private account? The contract itself is not very explicit. My conclusion is, that the vessel was not chargeable to the joint account until the termination of the voyage in which she was then engaged for Mr. Goddard, for these reasons:

1st. In the absence of any express provision, no good reason is seen
why this business should be charged with interest on a vessel
122 which is actually in the employment of Mr. Goddard for his sole
account and benefit.

2d. The clause providing that she is to be charged at her original cost, abating nothing for her use in her first and present voyage, not very directly, yet by a fair implication, refers the period for charging to the termination of her then present voyage.

3d. If the ship were chargeable to the joint account on May 7, 1849, then was she also at the joint risk from that period. If the business was chargeable with her it took the risk of her loss. But can it be said that while she was performing this voyage, undertaken and conducted by Mr. Goddard solely on his own account, she was at the risk of Mr Foster? This consideration is to my mind decisive.

May 5th, 1858. On the fifth day of May, 1858, the respondent presented, de bene esse, the account herewith returned, marked "Domestics, May 5th, 1858, E. M.," and claimed to be allowed the balance shown thereon, $6,319.33, on the ground that the goods, viz., 561 bales brown shirtings, had been purchased by him with the design to use them in this business, and that a loss had been sustained thereon to the amount shown by this account. This claim the respondent presented, de bene esse, to be urged if the views expressed by the master in reference to the Valdivia should be sustained.

The respondent put in the evidence of E. L. Stevens, herewith reported, and the two papers marked each "Domestics, May 6, 1858, E. M.," to show that these goods had been designed by him for this trade, and had been purchased by him with that view.

The complainant, in reply, put in the memorandum of sale, endorsed "May 6, 1858, Foster, E. M.," the fact that the Harriet Erving sailed upon her third voyage August 21st, 1850, which voyage was the last one in which said Foster was interested, and also the fact that the Crusader sailed upon her fifth voyage Nov. 6th, 1850, and the letter of Goddard to Foster, dated August 30th, 1850, which contains the following passage:

"I have to advise you that the Erving will sale to-morrow, Spavin, master, with a full cargo and four passengers, to Valparaiso. Notwithstanding many of these goods are of high cost, nearly the whole of them have advanced considerable since purchased, cotton goods so much so that I shall retain the 560 bales shirting for the Crusader, rather than save the interest by returning them."

I have not found it necessary to consider whether there is any competent evidence before me that the 560 or 561 bales in question were originally designed for the first adventure, or what the legal effect of such a fact would be, as I am satisfied, upon the evidence, that Mr. Goddard, on the 20th August, 1850, on account of the advance in the price of these goods over their original cost, did prefer to take, and did take, and retain them for the purpose of shipping them thereafter, on his own account, by the Crusader.

I do therefore report that this claim should be disallowed.

123 SUMMARY.

The subscriber finds and does accordingly report—

1st. That there was due from the respondent to the complainant upon the first day of May, A. D. 1857, the day of the filing of the bill under the two agreements set forth in the complainant's bill, exclusive of the profits of the second voyage of the Crusader and the third voyage of the Harriet Erving, the sum of forty-one thousand five hundred and eighty-one dollars and fifty-six cents, the interest being included to said May 1st, 1857 .... $41,581.56

2d. That the complainant is also entitled to one-fourth of the profits of the third voyage of the Harriet Erving, which, with the interest computed to March 1, 1858, amounts to twenty-one thousand nine hundred and forty-three dollars and fifteen cents $21,943.15

3d. That the complainant is also entitled to recover one-tenth of the profits of the second voyage of the Crusader, amounting to four thousand and five dollars and seventy-two cents, including interest to March 1, 1858, if, in the opinion of the court, the complainant's bill covers said claim, or if an amendment stating said claim is allowed............. $4,005.72

The item No. 1, being the balance due the claimant under both agreements, exclusive of items Nos. 2 and 3, is shown by the account endorsed A, E. M., May 1, and herewith returned; and the said account A is made up from the two accounts marked respectively "B, E. M., May 1," and "C, E. M., May 1," and herewith returned.

Papers E and F, being accounts of said Goddard with Alsop & Co. under the first and second agreements, and showing the balances in their hands, are also herewith returned.

June 2d, A. D. 1858. And now an additional order having been made in this cause, referring the same to the subscriber under the amended bill and answer, with directions "to state the accounts involved in the cause with all and the same powers and in as full and perfect manner and to the same intent and for the same purpose as if said amended bill and answer had been introduced into the cause prior to said former order of reference," in pursuance thereof I met the parties with their respective counsel, and neither party desiring to introduce any further testimony beyond that already before the master—I do adjudge and report that, under said amended bill, the complainant is entitled to recover one-tenth of the profits of the second voyage of the Crusader, which, with interest computed to March 1, 1858, amounts to the sum of four thousand and five dollars and seventy-two cents, $4,005.72.

124 RECAPITULATION.

The master finds and reports that under the original and amended bill the complainant is entitled to recover—

1st. The balance due him under the first and second agreements (exclusive of the second voyage of the Crusader and the third voyage of the Harriet Erving,) as per item No. 1, ($43,319.65)	$41, 581 56
2d. One-tenth of the profits of the second voyage of the Crusader, as per item No. 3, ($4,005.72).................	$4, 005 72
3d. One-fourth of the profits of the third voyage of the Harriet Erving, as per item No. 2, ($21,943.15)..........	$21, 943 15

This respondent's counsel submitted in the course of the hearing to the master several points contained in the paper herewith returned endorsed "Respondent's Points," and requested the master to pass upon them specifically. So far as deemed material, the master has considered and passed upon them in his report.

The counsel for the respondent now file with the master certain objections to this report, and the same are returned herewith.

At the request of the respondent's counsel, a separate report of the evidence presented before the master upon this hearing is also returned and filed in court herewith.

The master does not intend by so doing to leave open or to refer to the court any question upon which it was his duty to pass and upon which he has passed, nor in any way to affect or vary the rights of either party under the orders by which this cause has been referred to the master.

All which is respectfully submitted.

ELIAS MERWIN, *Master, &c.*

BOSTON, *June* 2, 1858.

125 The defendant, at the same May term, to wit, June 30, A. D. 1858, filed his exceptions to said report, as follows, and the case was set down for hearing thereon:

126 UNITED STATES OF AMERICA,
Massachusetts District:

Circuit court of the United States, May term, 1858. In chancery.

BETWEEN GEORGE J. FOSTER, COMPLAINANT,
and
WILLIAM W. GODDARD, RESPONDENT.

Exceptions taken by the said respondent to the report of Elias Merwin, one of the masters of this honorable court, bearing date June 2d, 1858, to whom this cause stands referred by two several decrees made in the said cause, bearing date respectively September 7th, 1857, and May 24th, 1858, whereby it was referred to him to take an account of the dealings and transactions between the complainant and defendant, as by the said decrees will appear.

First exception. For that the said master has not allowed to the said respondent, and has not permitted him to debit the business of this respondent, carried on by him under the contract dated June 24, 1843, sundry sums of money paid by the said respondent in the regular and usual course of his said business, for clerk-hire, taxes, and advertising, to wit, thirty-eight hundred and thirty-eight dollars and seventy-eight cents for clerk-hire, seventeen hundred and eleven dollars and ninety cents for taxes assessed upon the property employed in said business, and three hundred dollars paid for advertising his said business; the said sums amounting in the aggregate to fifty-eight hundred and fifty dollars and sixty-eight cents, all which were proper expenditures in the course of the said business.

Second exception. For that the said master has erroneously charged this respondent with the sum of seventeen hundred and eighty-nine dollars and eighty-nine cents, the amount of a loss made in the prosecution of the business aforesaid, by a sale of goods to the New England Worsted Company, for which they have not paid, but refuse to pay.

Third exception. For that the said master has allowed to the complainant, under the contract of June 24th, 1843, one-tenth of the profits made by this respondent in the construction and subsequent sale of a vessel commonly called the Valdivia, which vessel was not employed in nor put into the business of this respondent, carried on under the contract aforesaid.

Fourth exception. For that the said master, in taking an account of the business of this respondent, to which the contract of June 24th, 1843, refers, has fixed the value of a vessel called the Charlotte, as it was at a period of time some six months subsequent to the expiration of the five years mentioned in the contract of June 24th, 1843, whereas it should have been fixed at its value at the time of the expiration of said five years.

Fifth exception. For that the said master has allowed the complainant one-tenth of the profits made by this respondent by the use and employment of a vessel called the Crusader, and its cargoes,
127 during her second voyage, which was not sought to be recovered by the bill of the complainant as originally filed or as amended, and which was not and is not embraced by or in the contract of June 24, 1843.

Sixth exception. For that the master, in taking the accounts under the contract of June 24th, 1843, did not ascertain the value of the assets which had been employed in the business to which the contract refers, at the expiration of the said five years in the said contract mentioned, as should have been done, in order to ascertain the profits in which the complainant, under said contract was entitled to share; but, in taking the said accounts, erroneously allowed the complainant a portion of the profits made by the respondent in the prosecution of his business after the third of October, 1848, at which time the interest of the complainant in the business of the respondent altogether ceased.

Seventh exception. For that the said master, in taking the said accounts, has allowed the complainant a portion of the interest received by the respondent for the use of the money of this respondent, subsequent to the third of October, 1848.

Eighth exception. For that the said master has allowed to the complainant, under the contract of the seventh of May, 1849, a portion of the profits made by the respondent in the prosecution of his business and trade connected with Valparaiso, which was transacted and carried on by this respondent after the relation established by said contract between the complainant and respondent had ceased, and the rights and interest of the complainant in the business of this respondent had altogether determined; which rights and interest did determine on or about the first of April, 1850, which business and trade was not conducted to completion by the said complainant, and which did not receive the full benefit of all the services of the complainant to its final accomplishment.

Ninth exception. For that the said master did not ascertain the profits made by the respondent in his Valparaiso trade, to which the contract of the seventh of May, 1849, refers, by ascertaining the value of the assets which had been employed in the trade as it existed at the expiration of the time during which the complainant had an interest in the business and trade of said respondent under the said contract, as the said master should have done.

Tenth exception. For that the said master has allowed the complainant one-fourth of the profits made by this respondent in the use and employment of a vessel called the Harriet Erving, and its cargoes, during her third voyage, which was not sought to be recovered by the complainant in his original or amended bill; which vessel and cargoes, and the profits resulting therefrom during the said voyage, were not embraced in the contract of May 7th, 1849, nor by any contract or agreement made by the respondent with the complainant, but were solely and exclusively at the profit and loss of the respondent.

128 Wherefore the said respondent doth except to the said master's report, and appeals therefrom to the judgment of this honorable court.

WATTS & PEABODY,
C. B. GOODRICH,
For Respondent.

UNITED STATES OF AMERICA,
Massachusetts District:

Circuit court of the United States. In chancery.

BETWEEN GEORGE J. FOSTER, COMPLAINANT,
and
WILLIAM W. GODDARD, RESPONDENT.

Objections taken by the respondent to the draft of the report in this cause, prepared by Elias Merwin, esq., the master to whom this cause stands referred:

First objection. For that the master hath not, in and by the draft of his said report, credited to the respondent, or permitted him to debit the business carried on under the contract made by and between the parties to this suit, dated 24th June, 1843, with the sum of $3,838.78, being the amount paid by the said respondent, in the management and prosecution of the said business, for the service of clerks, which the said master ought to have done.

Second objection. For that the master hath not, in and by the draft of his said report, credited to the respondent, or permitted him to debit the business carried on under the contract dated June 24, 1843, with the sum of $711.90, expended and paid by the respondent for public taxes assessed upon the property employed by the respondent, in the said trade, as he ought to have done.

Third objection. For that the said master hath not, in and by the draft of his said report, credited to the respondent, or allowed him to debit the business carried on under the contract of June 24, 1843, the sum of $300, paid by the respondent for advertising the said business and the merchandise which was the subject thereof, which the said master ought to have done.

Fourth objection. For that the said master hath, in and by the draft of his said report, charged the respondent, in the business carried on under said contract, under date of February 28, 1848, with the sum of $1,789.89, being part of the amount of a loss sustained from a sale of merchandise, made to the New England Worsted Company by the respondent, in conducting the business under said contract, which the said master ought not to have done.

Fifth objection. For that the said master hath, in and by the draft of his said report, charged the respondent, in the business carried on under the contract dated June 24, 1843, with the sum of $7,866.77, as profit made by the respondent in the construction and sale of a ship, commonly called the "Valdivia," which ship was not employed in the business or trade which was carried on under the said contract, and was not in any manner connected therewith, which the said master ought not to have done.

129 Sixth objection. For that the said master hath, in and by the draft of his said report, charged the respondent with the ship "Charlotte," a vessel employed in the trade carried on under the contract dated June 24, 1843, at a value thereof at a time subsequent to the expiration of the said contract, whereas it should have been taken at the expiration of the five years in said contract mentioned, and by means of such erroneous valuation hath charged the respondent with the sum of $7,000 more than the value of said ship as it existed at the expiration of the aforesaid five years, which the said master ought not to have done.

Seventh objection. For that the said master hath, in and by the draft of his said report, undertaken to ascertain and certify the profit made by the respondent from the outward and return cargo of a ship called the "Crusader," during the second voyage from Boston to Valparaiso, and from Valparaiso to Boston, which vessel was owned by the respondent, and performed the voyages aforesaid, solely and exclusively at the profit and loss of the respondent, and not within the contract dated June 24, 1843, and not embraced by the contract set up in the bill of the complainant, and not in the said bill sought to be recovered, which the said master ought not to have done. And, also, for that the said voyage is not embraced in or by the bill as amended, and for that no proof has been adduced showing or tending to show any interest of the complainant in his outward or return cargo under the said contract, or under any other agreement of the respondent.

Eighth objection. For that the said master hath, in and by the draft of his said report, credited to the complainant under the contract dated 7th May, 1849, the sum of $23,600.47, as profits made by the respondent, from the outward and return cargo of a ship called the Harriet Erving, during her third voyage from Boston to Valparaiso, and from

Valparaiso to Boston, which vessel during the said voyage was owned by the respondent, and performed the voyage aforesaid at his cost, risk, and profit exclusively, and not within or under the contract aforesaid, and for which the complainant has not, in his bill of complaint, set up any right, title, or interest, which the said master ought not to have done.

Ninth objection. For that the master hath, in and by the draft of his said report, allowed the complainant, under the first contract, a portion of the profits made by the said Goddard, after the third day of October, eighteen hundred and forty-eight, by the sales of merchandise which the said Goddard had on hand on the said third day of October, and has employed in his Valparaiso business.

Tenth objection. For that the master hath, in and by the draft of his said report, allowed the complainant a proportion of the interest allowed by Alsop & Company to the respondent for the use, by them, after the third of October, eighteen hundred and forty-eight, of money in their hands belonging to the respondent, and in which the complainant has no interest.

130 Eleventh objection. For that the master hath, in and by the draft of his said report, allowed the complainant, under the second contract, a portion of the profits realized by the respondent in his Valparaiso business, after the first day of April, eighteen hundred and fifty, at which time the interest of the complainant in the business of the respondent ceased by the election of the complainant.

Twelfth objection. For that the master hath not, in and by draft of his said report, ascertained, as he should have done, the value of the property on hand, on the 3d October, 1848, at which time the relation between the parties under the first contract determined, and has not stated the profits of the business done under said contract, as they existed on said third of October.

Thirteenth objection. For that the master hath not ascertained the profits of the business carried on by the respondent under the second contract, by a statement thereof, and of the accounts as they existed, at the determination of the relation of the parties under the second contract.

Fourteenth objection. For that the master hath not charged the complainant with one fourth of sixty-three hundred and nineteen dollars and thirty-three cents, being his proportion of a loss sustained upon the purchase and sale of five hundred and sixty-one bales of goods.

In which particulars the said respondent, William W. Goddard, does object to the draft of the said report, and prays that the same may be varied and altered.

WATTS & PEABODY,
C. B. GOODRICH,
For Respondent.

The cause was thence continued, from term to term, to the May term, A. D. 1859, when the same was fully heard and argued by counsel. The same was thence continued to this present October term, A. D. 1859, when the Honorable Nathan Clifford, associate justice, being present, the following decree is entered and pronounced, (to wit, Oct. 15 :)

This cause came on to be heard at the May term of this court, in the year eighteen hundred and fifty-nine, upon the report of Elias Merwin, the master, to whom the cause stands referred, dated the second day of June, in the year eighteen hundred and fifty-eight, and upon the exceptions thereto, filed in court by the respondent on the thirteenth day of June, in the year eighteen hundred and fifty-eight.

And the parties, by their counsel, being fully heard by the court upon the said report and upon the exceptions thereto, the cause was continued for advisement thereon. And, now, at this present term, upon consideration of the matters alleged by the counsel on both sides, the court doth order, adjudge, and decree that the first exception to said report, in which the respondent complains and excepts, that the
master did not allow the respondent to debit the business by
131 him carried on under the contract dated June 24th, 1843, in the
bill of the complaint set up, with sundry sums of money paid by
the respondent for clerk-hire, taxes, and advertising, as set forth in the first, second, and third objections of the said respondent, and by him made to the draft report of the said master, is sustained.

And the court doth also order, adjudge, and decree, that the tenth exception to the said report, which is founded upon the eighth objection to the draft report, in which the respondent complains and excepts that the master allowed the complainant a portion of the profits made by the respondent in the use and employment of a vessel called the Harriet Erving, and in the cargoes of said vessel during its third voyage, under the contract of May seventh, in the year eighteen hundred and forty-nine, in the complainant's bill set up, is sustained. The court doth also order, adjudge, and decree, that the second, third, fourth, fifth, sixth, seventh, eighth, and ninth, exceptions, be overruled.

And it is further ordered that the report of the said master be referred back to him to be reviewed; and he is directed to allow to the respondent such sums as he may have paid under the contract dated June 24th, 1843, for clerk-hire, taxes, and advertising, as aforesaid, and to inquire and state to the court the amount due to the complainant after such allowances to the respondent, and exclusive of the profits from the aforesaid voyage of the Harriet Erving.

And the court doth reserve the consideration of all further directors until after the said master shall have reviewed his report as herein directed.

And now, (Oct. 31,) the plaintiff, by Sohier & Welch, his solicitors, moves to amend his bill of complaint by inserting therein on the page thereof after the words, as "hereinbefore set forth," the following words, to wit:

And your orator further shows to said court that, before the notice hereinafter stated, given by your orator to said Goddard of his intention to terminate said agreement had been received or assented to by said Goddard, there had been projected and arranged between your orator and said Goddard a voyage to be performed, under said agreement, by a certain ship called the Harriet Erving, which ship was to be fitted out in the manner usual under said agreement, and on the twenty-second day of February, eighteen hundred and fifty, your orator gave notice to said Goddard of his intention to terminate said agreement on the thirty-first day of December following, and that he would in the meantime manage the business under said agreement as usual, and said Goddard, by his letter dated April 13th, 1850, assented thereto. And said ship was thereafterwards, with her cargo, sent and consigned to your orator in the manner usual under said agreement. And although the said voyage of said ship, as was well known to said Goddard and your orator, might and probably would not be wholly completed on or before the said thirty-first day of December, yet it was well understood and agreed between them that said voyage should be deemed 132 to be within the said agreement, and that your orator should be interested therein in the same manner as if the same could have been or was to be entirely completed prior to and on the said thirty-first day of December. And your orator did render his services for and in relation to said ship and her cargo, and the return voyage thereof, in the same manner as he rendered and was to render the same in relation to the other voyages and adventures commenced and completed under the agreement aforesaid up to and on the said thirty-first day of said December, when said agreement was to terminate, and afterwards. And your orator further shows

which motion, having been fully argued by counsel, is denied by the court.

.[Erased by me. H. W. FARRIER, *Clerk.*]

Afterwards, at the same term, (Nov. 11,) the said master filed the following corrected report:

The subscriber, to whom this cause was recommitted by the accompanying decree of the honorable court, with instructions to allow the respondent such sums as he may have paid under the contract dated June 24, 1843, for clerk-hire, taxes, and advertising, and also to inquire and state to the court the amount due to the complainant after such allowances to the respondent and exclusive of the profits of the third voyage of the ship Harriet Erving, to a share in which the said complainant, according to said decree, is not entitled, respectfully reports:

That the balance due the said complainant, after making said allowances and deductions, exclusive of the profits of the second voyage of the Crusader, with interest computed to October 15th, 1859, is forty-seven thousand one hundred and thirty-nine dollars and $\frac{45}{100}$...........	$47,130 45
And that the complainant's share (one-tenth) in the profits of the voyage of the Crusader, with interest computed to October 15, 1859, is four thousand three hundred and ten dollars $\frac{54}{100}$..................................	$4,310 54
	$51,440 99

Making the sum of fifty-one thousand four hundred and fifty dollars and $\frac{99}{100}$ due to the complainant under said judgment and decree of the court, with interest computed to October 15th, 1859, and I do accordingly report the same as the sum so due to the complainants.

All of which is respectfully submitted.

E. MERWIN, *Master, &c.*

Nov. 9, 1859.

This cause came on again to be heard at this present term, on motion of Edward D. Sohier, esquire, solicitor of the complainants, for a final decree, and on reading the revised and corrected report of Elias Merwin, esquire, the master to whom this cause was recommitted with 133 directions contained in the order of court of the 31st of October last, which report was filed on the eleventh day of November last, no exception thereto having been taken other than those to the original report which are still relied upon: It is ordered, adjudged, and decreed by the court that the said revised and corrected report be, and the same hereby is, accepted and confirmed; and it is now here further ordered, adjudged, and decreed by the court that the said George J. Foster, the complainant, do recover of the said William W. Goddard the amount reported by said master in his said report as due from the respondent, namely, the sum of fifty-one thousand four hundred and forty dollars and ninety-nine cents, together with his costs of suit taxed at thirteen hundred and seventeen dollars and sixty-nine cents.

And now, George J. Foster, the above-named plaintiff, conceiving himself aggrieved by the final decree entered in the above-entitled cause on the day of the date hereof, doth hereby, in open court, appeal therefrom to the Supreme Court of the United States next to be held at Washington, on the first Monday of December, eighteen hundred and sixty, and prays that his appeal may be allowed. The sum in dispute exceeds two thousand dollars.

S. BARTLETT & E. D. SOHIER.

And said Foster thereupon gives satisfactory security to prosecute his said appeal with effect, and to pay all damages and costs in case he shall fail to make good his appeal, which security is approved by the court.

And now, William W. Goddard, the above-named defendant, conceiving himself agrieved by the final decree entered in the above-entitled cause on the day of the date hereof, doth hereby, in open court, appeal therefrom to the Supreme Court of the United States next to be holden at Washington, on the first Monday of December next ensuing, which will be in the year of our Lord one thousand eight hundred and sixty, and hereby prays that this his appeal may be allowed. The sum in dispute exceeds two thousand dollars.

W'M W. GODDARD.

And said W'm W. Goddard thereupon gives satisfactory security to prosecute his said appeal with effect, and to pay all damages and costs in case he shall fail to make good his appeal, which security is approved by the court.

134 And afterwards, at a term of said Supreme Court, held at Washington on the day of December, 1861, the said decree of the said circuit court was affirmed, with costs, and plaintiff's counsel admit that defendant has paid the amount in said decree ordered.

135 Plaintiff's counsel objects to the evidence offered upon what appears upon the face of the record.

The court excludes the record as inadmiss*a*ble and not a bar to any claim contained in the declaration.

To which decision counsel for defendant excepted.

Defendant's counsel then offered the same record under the first count in bar of the cause of action sought to be established under that count by the testimony of the witness, Stevens, and the agreement.

The COURT. I do not take the offer in that form, because the plaintiff states that he does not make any such claim. I take it as an offer in the suit. I do not think it is competent under any branch of the case, though, of course, the defendant has a right to offer it in reference to each count in the declaration.

Defendant's counsel excepted.

Defendant's counsel also offered it in bar of the cause of action sought to be sustained by the testimony of Stevens and the agreement of May, 1849.

The COURT. If there is any cause of action sought to be established by the agreement of May, 1849, I will admit it.

Defendant's counsel offered it because it was impossible to say what might be claimed hereafter.

136 The COURT. It is not admissible. I exclude it because there is no such cause of action and can be none.

Defendant's counsel excepted.

Defendant's counsel also offered the record in bar of so much of the claim of Foster for services as have been proved prior to the 1st of January, 1851, which would cover all the counts in the declaration.

Record excluded. Defendant's counsel excepted.

WILLIAM W. GODDARD, the defendant, being examined, said that he had been engaged in mercantile pursuits for thirty-five years, and that for forty years he had been observing the course of trade between Boston and the west coast of South America, including Valparaiso; that during his clerkship he had chances to notice the general character of articles which were sent to that country and of those which were brought back; that he knew the plaintiff's father, but had little or no acquaintance with the plaintiff himself before employing him as supercargo on the first of the two voyages to Valparaiso, mentioned by him.

Q. Were these two voyages successful or otherwise?

137 (Objection by plaintiff's counsel as irrelevant; question excluded.)

That he never had any transaction with Alsop & Co. till the first voyage Mr. Foster made for him, he thought, in 1841; that he knew that Mr. Riley was partner of Alsop & Co. from 1843 to 1850, but he did not know him.

Q. Had you any reason to suspect the competency of Mr. Riley or of Alsop & Co. to manage your consignments?

(Objection by pl'ff; question excluded; defendant excepts.)

He further said that his reasons for engaging Mr Foster as his agent were because Alsop & Co. were all strangers to him, and he thought the presence of a good agent was next to a personal presence. That if he had not had an agent at Valparaiso he would have consigned his goods to Alsop & Co. direct, but there would have been a disadvantage in consigning to Alsop & Co. direct, because, in that case, Alsop & Co.'s other constituents would have had the benefit of his knowledge of the trade; by having an agent of his own, he had the advantage also of protecting his goods from the competition of similar goods sent to them by other consignors. There should also have been an advantage in having an agent that he could effect purchases as against competing orders sent to Alsop & Co. After the termination of Mr. Foster's

138 agency witness said he sent out his brother-in-law, Mr. Shirley Erving, to act as his agent.

Q. What compensation did you pay him as agent?

(Objected to by pl'ff's counsel as irrelevant; objection sustained,)

Defendant's counsel offered to show that shortly after the termination of Mr. Foster's agency, defendant sent out another agent equally competent, with Mr. Foster, to whom he paid a salary of $4,000 per annum.

(Evidence excluded; defendant excepts.)

Mr. Foster's services as agent, in the absence of a special agreement, were worth $4,000 per annum. Mr. Foster received nearly $27,000 under the second agreement, paid under the execution in the former suit.

Cross-examined:

Witness said he thought $4,000 would have been sufficient compensation for Mr. Foster's services as agent from the time he began until he left off; that was his view when he made the bargain with Mr. Foster; the business exceeded his expectation; that he could not say that it was his view when he made the second agreement with Foster, because he did not remember. Out of this $4,000 Mr. Foster would have had to pay his personal expenses, except his board, which cost him 139 nothing; that he could not say what he would himself have thought it worth a year to have gone out; that he was not there in the same position as Mr. Foster; that he could not have gone in Mr. Foster's place, as he was then doing a large business. He was engaged in real estate somewhat, but not doing much business other than this with South America; that he would not swear he was not doing any other and was not quite prepared to swear that he was doing anything else; that he knew Mr. Foster very well when he made the second agreement, and knew the trade well then; that he could not say he was a better merchant than Mr. Foster.

(Plaintiff's counsel admitted that plaintiff had collected on execution the judgment rendered against defendant in the aforesaid action in the circuit court for Massachusetts.)

Witness being recalled said that he had paid for all services rendered under the first and second contracts.

Being cross-examined, he said that he meant judgment was paid.

Defendant's counsel then offered to read in evidence the bill of complaint and judgment in said action in the circuit court.

(Evidence excluded; defendant's counsel excepted.)

Defendant rests.

140 The evidence being closed and the foregoing being all the testimony in the cause, defendant's counsel moved the court thereupon to direct the jury to find a verdict for the defendant, on the following grounds:

That the claims set forth in the first count of plaintiff's declaration was for a balance alleged to be due him on transactions had under an agreement of copartnership with the defendant and cannot be recovered because there is no evidence of agreement by defendant to pay a balance struck, or that any balance was struck.

That there was no evidence of any such agreement as is set forth in said first count.

That the plaintiff could not recover for the services rendered on the 3rd voyage of the Harriet Erving under the contract of 7th January, 1849. And there was no evidence of any other agreement applying the terms of said contract to that voyage.

That the plaintiff could not recover under the common counts of the declaration, because by the contract of 7 May, 1849, defendant was entitled to all plaintiff's services in relation to every kind of business until 1st January, 1851, which included business which might not be 141 brought to completion within that time, and consequently all services rendered up to that time in relation to the 3rd voyage of the Harriet Erving, and as defendant was thus entitled to these services without other compensation than was agreed upon in the said contract, the law will not imply an agreement to pay anything more.

Because, also, no evidence has been offered to prove an agreement to pay for these services beyond the stipulation in the contract, other than the letters which have been passed between the parties.

Foster's letter of 22nd Feb'y, 1850, was a proposed agreement to perform the requirements and abide by all the terms of the contract until 1st of January, 1851, and a severance on that day of the connection arising out of the contract.

Goddard's acceptance of the agreement proposed in this letter made it binding on both parties both as to the continuance and termination of the contract.

Said agreement was not varied by the correspondence which passed afterwards between the parties.

There was no correspondence nor verbal communication between the parties from which any agency on the part of plaintiff can be implied other than that created by the contract of 7 May, 1849.

142 But all the correspondence shows that both parties understood that the relations between them, created by the contract of 7 May, 1849, continued until 1 January, 1851, and then terminated. Such was the decision of supreme court in the suit between the parties in Massachusetts.

There was no evidence that after 31 December, 1850, plaintiff acted for defendant in any other capacity than as one of the firm of Alsop & Co., or that defendant assented to his acting, or had notice of his acting, in any other capacity than as a member of that firm.

The court refused to grant said motion, to which refusal and decision the defendant did then and there except.

The plaintiff's counsel then made the following requests to charge.

I. That if the jury find that the plaintiff performed the service in respect to the third voyage of the Harriet Erving, which have been given in evidence, then he is entitled to recover in this action a compensation for such services.

II. That if the jury shall find upon the evidence that the rate or measure of this compensation was fixed between the parties by mutual
143 agreement or mutual understanding, then the jury will find for the plaintiff for that amount, and will add interest thereon from the time at which by such agreement or understanding they shall find the compensation became due and payable.

III. That it is not necessary that the agreement between the parties in respect of employment or rate of compensation should be in writing, and the jury are to consider the situation of the parties towards each other, and the business at and before the time of the commencement of the Harriet Erving's third voyage, and the correspondence between the parties during the performance of the services of the plaintiff, in respect to the third voyage of the Harriet Erving, and the acts of the parties during the same time, and upon such evidence, if they shall find that the plaintiff acted as the agent of the defendant and performed the services for him in the business of the Harriet Erving's third voyage, and that the rate of his compensation was understood and agreed between the parties, then the plaintiff is entitled to their verdict for such agreed sum, with interest from the time when the same became due and payable.

IV. That if the jury shall not find that *that* the rate or sum of the plaintiff's services which they shall find he performed, in respect
144 to the third voyage of the Harriet Erving, was fixed by any understanding or agreement between the parties, then they will find such sum as they shall find upon the whole evidence in the case such services were reasonably worth, with interest thereon from the commencement of the suit.

V. That in estimating the rate or sum of such reasonable compensation to the plaintiff, in respect of his services in relation of the third voyage of the Harriet Erving, the jury may take into view the rate of compensation which the parties had fixed in their previous relations in respect to similar services as well as the rates given as reasonable by the witnesses speaking of the same, and will give such sum as they shall judge a reasonable compensation for the actual services of the plaintiff, in respect to the third voyage of the Harriet Erving, to be paid by the defendant, under all the circumstances, and their performance shown in the evidence.

The counsel for the defendant requested the court to charge and instruct the jury as follows:

I. To find a verdict for the defendant.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

145 If the court shall decline, the court is requested to instruct them—

II. That the plaintiff cannot recover under or by virtue of the agreement introduced in evidence under the first count of the declaration.

(The court so instructed the jury.)

III. That the plaintiff is not entitled to recover any portion of the profits made or realized by means of the third voyage of the Harriet Erving.

(The court so instructed the jury.)

IV. That the plaintiff cannot recover in this action for services rendered in or about the third voyage of the Harriet Irving, prior to the 1st day of January, 1851, because, by virtue of the agreement of May 7, 1849, said plaintiff was bound to render such services for the consideration in said agreement mentioned.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

V. That there is no sufficient evidence to establish any employment of the plaintiff by the defendant, in or about the business of that voyage, after the 31st day of December, 1850, except as a member of the house of Alsop & Co., and that for services rendered by such
146 firm the plaintiff cannot recover in this action.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

VI. If the two last preceding instructions shall be given, then the court is further requested to direct the jury to find a verdict for the defendant.

(The last two preceding instructions requested were not given.)

VII. If the court shall decline to instruct the jury to find a verdict for the defendant, or to give the instructions embodied in the fifth request, and shall hold that there is evidence from which the jury may infer the employment by the defendant of the plaintiff in and about the business of the third voyage of the Harriet Erving, after the 31st of of December, 1850, then the court is requested to instruct them that inasmuch as the plaintiff has expressly sworn that nine-tenths of his services concerning that voyage were rendered before Jan'y 1, 1851, but one-tenth the value of his entire services in respect to that voyage can be recovered in this action.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

147 VIII. In estimating the value of the services of the plaintiff, the jury must entirely disregard the proof of profits made by the defendant from the third voyage of the Harriet Erving.

(The court so instructed the jury.)

IX. The court is requested to charge that if the jury shall find that an agreement substantially like that averred in the first count of the declaration was entered into between the plaintiff and defendant, such agreement constitutes them partners in the adventure of the third voyage of the Harriet Erving, no part of the profits of which adventure can be recovered in this action without proof of a balance struck, and a promise by defendant to pay the same to the plaintiff, and that there is no sufficient evidence of such promise.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

X. The court is also requested to charge that if the jury shall find that an agreement substantially like that set out in said first count was made between the plaintiff and defendant, whereby the former was to take the risk and perform the services by him alleged to have been rendered in and about the third voyage of the Harriet Erving, in considera-
tion of receiving one-fourth of the net profits of the said voyage,
148 the said plaintiff is not entitled to recover the value of said ser-
vices under either of the other counts of said declaration, but can, as compensation for said services, only recover his proportion of the profits of said voyage in some appropriate action.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

XI. To entitle the plaintiff to recover any compensation whatever for services by him performed in and about the said voyage, the jury must be satisfied, from evidence in the cause, that the plaintiff was by the defendant employed to perform such services by some agreement distinct from and independent of that of May 7, 1849.

(The court so instructed the jury.)

His honor Judge Blatchford then charged the jury as follows:

Gentlemen of the Jury: It is a subject of congratulation, at this stage of this case, that the thorough discussions to which you have listened on the part of counsel makes it unnecessary to detain you more than a very short time in the observations I have to make. It has been
seen by you, when the relations between these parties commenced.
149 This agreement of 1843 was to last five years. At the expiration
of this time Mr. Foster returned from South America, and while here he made this new contract of 1849. Notice of the termination of this last contract was given by Mr. Foster in February, 1850, and was received by the defendant in April of that year. The relations under the contract to its close, on the 31st December, 1850, you have learned. Then follows the constant correspondence, on the part of Mr. Foster, to obtain a settlement, and then the result of the litigation in Boston, in which one party resisted, and the other claimed directly, a compensation for this third voyage of the Harriet Erving, which is now before you for solution. That suit finally ended by the Supreme Court at Washington deciding against the claim of Foster, and then as early after as possible this suit was commenced, showing, on the part of Mr. Foster, nothing in the shape of action or inaction, by which any consideration of his case in this suit ought at all to suffer prejudice at your hand, and nothing, on the other hand, in the way of prejudice, against Mr. Goddard, from the same circumstance, because he contended for what he believed, and what his counsel believed, to be his right in respect to the matter of the 3rd voyage of the Harriet Erving. Neither party is in any

voyage of the Harriet Erving, the jury may take into view the rate of compensation which the parties had fixed in their previous relations in respect to similar services as well as the rates given as reasonable by the witnesses speaking of the same, and will give such sum as they shall judge a reasonable compensation for the actual services of the plaintiff, in respect to the third voyage of the Harriet Erving, to be paid by the defendant, under all the circumstances, and their performance shown in the evidence.

The counsel for the defendant requested the court to charge and instruct the jury as follows:

I. To find a verdict for the defendant.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

145 If the court shall decline, the court is requested to instruct them—

II. That the plaintiff cannot recover under or by virtue of the agreement introduced in evidence under the first count of the declaration.

(The court so instructed the jury.)

III. That the plaintiff is not entitled to recover any portion of the profits made or realized by means of the third voyage of the Harriet Erving.

(The court so instructed the jury.)

IV. That the plaintiff cannot recover in this action for services rendered in or about the third voyage of the Harriet Irving, prior to the 1st day of January, 1851, because, by virtue of the agreement of May 7, 1849, said plaintiff was bound to render such services for the consideration in said agreement mentioned.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

V. That there is no sufficient evidence to establish any employment of the plaintiff by the defendant, in or about the business of that voyage, after the 31st day of December, 1850, except as a member of the house of Alsop & Co., and that for services rendered by such
146 firm the plaintiff cannot recover in this action.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

VI. If the two last preceding instructions shall be given, then the court is further requested to direct the jury to find a verdict for the defendant.

(The last two preceding instructions requested were not given.)

VII. If the court shall decline to instruct the jury to find a verdict for the defendant, or to give the instructions embodied in the fifth request, and shall hold that there is evidence from which the jury may infer the employment by the defendant of the plaintiff in and about the business of the third voyage of the Harriet Erving, after the 31st of of December, 1850, then the court is requested to instruct them that inasmuch as the plaintiff has expressly sworn that nine-tenths of his services concerning that voyage were rendered before Jan'y 1, 1851, but one-tenth the value of his entire services in respect to that voyage can be recovered in this action.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

147 VIII. In estimating the value of the services of the plaintiff, the jury must entirely disregard the proof of profits made by the defendant from the third voyage of the Harriet Erving.

(The court so instructed the jury.)

IX. The court is requested to charge that if the jury shall find that an agreement substantially like that averred in the first count of the declaration was entered into between the plaintiff and defendant, such agreement constitutes them partners in the adventure of the third voyage of the Harriet Erving, no part of the profits of which adventure can be recovered in this action without proof of a balance struck, and a promise by defendant to pay the same to the plaintiff, and that there is no sufficient evidence of such promise.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

X. The court is also requested to charge that if the jury shall find that an agreement substantially like that set out in said first count was made between the plaintiff and defendant, whereby the former was to take the risk and perform the services by him alleged to have been rendered in and about the third voyage of the Harriet Erving, in consideration of receiving one-fourth of the net profits of the said voyage, 148 the said plaintiff is not entitled to recover the value of said services under either of the other counts of said declaration, but can, as compensation for said services, only recover his proportion of the profits of said voyage in some appropriate action.

(The court refused so to instruct the jury, to which refusal the defendant did then and there except.)

XI. To entitle the plaintiff to recover any compensation whatever for services by him performed in and about the said voyage, the jury must be satisfied, from evidence in the cause, that the plaintiff was by the defendant employed to perform such services by some agreement distinct from and independent of that of May 7, 1849.

(The court so instructed the jury.)

His honor Judge Blatchford then charged the jury as follows:

GENTLEMEN OF THE JURY: It is a subject of congratulation, at this stage of this case, that the thorough discussions to which you have listened on the part of counsel makes it unnecessary to detain you more than a very short time in the observations I have to make. It has been seen by you, when the relations between these parties commenced. 149 This agreement of 1843 was to last five years. At the expiration of this time Mr. Foster returned from South America, and while here he made this new contract of 1849. Notice of the termination of this last contract was given by Mr. Foster in February, 1850, and was received by the defendant in April of that year. The relations under the contract to its close, on the 31st December, 1850, you have learned. Then follows the constant correspondence, on the part of Mr. Foster, to obtain a settlement, and then the result of the litigation in Boston, in which one party resisted, and the other claimed directly, a compensation for this third voyage of the Harriet Erving, which is now before you for solution. That suit finally ended by the Supreme Court at Washington deciding against the claim of Foster, and then as early after as possible this suit was commenced, showing, on the part of Mr. Foster, nothing in the shape of action or inaction, by which any consideration of his case in this suit ought at all to suffer prejudice at your hand, and nothing, on the other hand, in the way of prejudice, against Mr. Goddard, from the same circumstance, because he contended for what he believed, and what his counsel believed, to be his right in respect to the matter of the 3rd voyage of the Harriet Erving. Neither party is in any

manner to suffer any prejudice in this case by the lapse of time
150 which has taken place.

I instruct you, gentlemen, that Mr. Foster is entitled to recover in this case such sum as the reasonable quantum meruit value of his services, upon the evidence, you may regard to be proper.

(To which instruction the defendant's counsel did then and there except.)

That includes a consideration by you of what his services were, the entire scope of the trade, and Mr. Foster's qualifications for those services at the time he rendered the services in reference to this 3rd voyage of the Harriet Erving, and the consideration of how much these services were in bulk or in value before the 1 of January, 1851, and the consideration of the extent of these services after that date, and whether they are to be diminished after by any payment or allowance which ought to be charged against Mr. Foster because of any compensation he may have received as a member of the firm of Alsop & Co. The whole question is one of fact for you to pass upon as men of judgment and intelligence, and upon the evidence, applying your best faculties to it. If you arrive at any sum which you regard as proper for the value of these services, then Mr. Foster is entitled to interest on that sum
151 at the rate provided by law of the State of New York, 7 per cent. per annum, from the time of the commencement of this suit. In round numbers, you may take the time as 8 years and a quarter. He is entitled to the rate of the city of New York, because, as I said, when this suit was brought here in the city of New York, Mr. Goddard had the privilege of stopping the interest by tendering or paying into the court the proper sum.

(To which instruction, that the plaintiff is entitled to interest at the rate of 7 per cent. from the commencement of the suit, the defendant did then and there except.)

Now, gentlemen, in order to put this case in proper shape, I shall, in my further instructions to you, merely pass upon the general requests to charge which have been made to me. If you find the plaintiff performed any service, in respect to the 3rd voyage of the Harriet Erving, which have been given in evidence, then he is entitled to recover, in this action, a compensation for such services as you shall find the services to be, and as you shall find the compensation to be proven, in your judgment, as a reasonable compensation, taking into con-
152 sideration on this subject, the whole evidence in the case in regard to the reasonable worth of the services, and the evidence given by Mr. Foster, and the evidence given by Mr. Riley, and the evidence given by Mr. Goddard, the rates of compensation specified in the two contracts, which have been put in evidence here, in view of all the circumstances connected with these rates, and the consideration that induced their establishment as they have been shown to you by the evidence.

(To which instruction, commencing with the words, "If you find the plaintiff performed any services," and ending with the words, "by the evidence," and to each and every part thereof, the defendant did then and there except.)

In estimating the rate or sum of such reasonable compensation to the plaintiff, in respect to his services in relation to the 3rd voyage of the Harriet Erving, you may take into consideration the rate which the parties had fixed, in their previous relations, in respect to similar services, as well as the rates given, as reasonable, from the witnesses speaking of the same, and give such sum as you shall judge a reason-

able compensation for the actual services of the plaintiff in respect of the third voyage of the Harriet Erving, to be paid by the
153 defendant under all the circumstances of the services, and their performance shown in the evidence. The only qualification I have to make, in regard to that is, that in looking at this sum, fixed by the previous relations, you must take into consideration precisely what the previous relations were. You must take into consideration the facts that the compensation of one-tenth and one-fourth were based upon the risk and responsibility on the part of Foster, which did not exist in respect to the third voyage of the Harriet Erving, and all other circumstances which led to the fixing that sum, as a measuring, not merely of the value of Mr. Foster's services, but of the estimation in which Mr. Goddard held him as agent.

(To which instruction, beginning with the words, "In estimating the rate or sum," and ending with the words, "Mr. Goddard held him as agent," and to each and every part thereof, the defendant did then and there except.)

The other propositions, submitted on the part of the plaintiff, which I have not affirmed, are considered as disaffirmed, and so in respect to the request made by the defendant, as I state the entire recovery is put upon a quantum meruit what Mr. Foster reasonably deserved to
154 have for the services; and, therefore, I charge you that the plaintiff cannot recover under and by virtue of the agreement introduced under the first count, which was a specified agreement for one-fourth of the profit. I also charge you that the plaintiff is not entitled to recover any portion of the profits realized on the third voyage of the Harriet Erving. I also charge you that, in estimating the value of the services of the plaintiff, you must entirely disregard the proof of the profits made by the defendant on the third voyage of the Harriet Erving. I also charge you that to recover any compensation whatever for services by him performed in and about the said voyage, the plaintiff must satisfy you, by the evidence in the cause, that he was employed by the defendant to perform some service by some agreement distinct and independent from that of May 7, 1849, because the agreement of 1849 is entirely out of the case, and those services, in reference to the Harriet Erving, depend entirely upon another agreement; that agreement, I charge you, as matter of law, as one drawn from correspondence between the parties, you are bound to find. The court instructs you, as a matter of law, that there was an agreement between these parties for the performance, by Mr. Foster, of such services as he rendered, in respect of the third voyage of the Harriet Erving,
155 to be compensated for at such rates as these services reasonably deserved.

(To which instruction, commencing with the words, "That agreement," and ending with the words, "reasonably deserved," the defendant's counsel then and there excepted.)

These are all the instructions I think it is necessary to give you; all the other requests are considered as refused.

(Defendant's counsel duly excepted to his honor's refusal to charge the points for defendant as aforesaid, as well as to the portions of the charge hereinbefore specified.)

One of the jurors thereupon asked whether there was any evidence showing the amount of commissions of the third voyage of the Harriet Erving which Alsop & Co. received after Mr. Foster became a member of that firm?

Mr. EVARTS. There was $150,000 of gross sales after he went into the

house, and on which there was commission of 4 per cent. for selling and 2½ per cent. for guarantee. On the homeward cargo they received one per cent. for the purchase of copper, 2½ per cent. on purchase of hides, and 5 per cent. on the purchase of wool, out of which they
156 had to pay 2½ per cent., and nothing on the bullion.

His honor, the judge, thereupon gave the figures, as follows:

Entire net proceeds on the sale of the outward cargo at Valparaiso and Lima of the Harriet Erving	$205,620 74
The entire net proceeds of the sale of the homeward cargo of the Harriet Erving	$208,606 84
Total	$414,227 58

Upon which 5 per cent., according to one of the witnesses, would make $20,711.37.

Plaintiff's counsel then stated that of the outward cargo only $96,000 worth were sold prior to January 1, 1851. That is the gross sales.

His honor then stated: It may as well be stated that it has been proven that the net proceeds of the cargo in Valparaiso was $205,620.74; that the $96,631, sold prior to January 1st, was the gross sales. The net proceeds of those sales of $96,631 is $80,211, the amount realized prior to the 1st of January, 1851.

One of the jurors then asked whether the jury are to take into consideration the fact that by the settlement of this account up to 1862, the date of the commencement of this suit, the plaintiff loses interest?
157 And the court said that they were not; and the jury thereupon rendered a verdict in favor of the plaintiff for $29,407.70.

And because none of the said exceptions so offered and made to the opinion and decisions of the said circuit judge appears upon the record of said trial, therefore on the prayer of the said defendant, by his counsel, the said circuit judge hath to this bill of exceptions set his seal according to the statute, this nineteenth day of December, eighteen hundred and seventy.

SAM'L BLATCHFORD. [L. S.]

158 As yet of October term, 1871. U. S. circuit court.

WILLIAM W. GODDARD, PLAINTIFF IN ERROR,
vs.
GEORGE J. FOSTER, DEF'T IN ERROR.

Afterwards, to wit, on the first day of October, eighteen hundred and seventy-one, of this same term, comes the said William W. Goddard, by Daniel D. Lord, his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, viz, that the declaration aforesaid and the matter therein contained are not sufficient in law for the said George J. Foster to have or maintain his aforesaid action thereof against him, the said William W. Goddard, and that there is error also in this, to wit, that, by the record aforesaid it appears that the judgment aforesaid was given for the said George J. Foster against the said William W. Goddard, whereas by law the said judgment ought to have been given for the said William W. Goddard against the said George J. Foster.

And the said William W. Goddard prays that the judgment aforesaid, for the errors aforesaid, as well as for other errors in the record
159 and proceedings aforesaid, may be reversed, annulled, and alto-

gether held for nothing, and that he may be restored to all things that he hath lost by occasion of the said judgment, &c.

D. D. LORD,
Att'y for Pl'ff in Error.

(Endorsed:) U. S. circuit court. William W. Goddard, pl'ff in error, vs. George J. Foster, def't in error. Assignment of errors. D. D. Lord, att'y for pl'ff in error. Filed Oct. 11, 1871.

160 In the circuit court of the United States for the southern district of New York, of October term, 1871.

GEORGE J. FOSTER, DEFENDANT IN ERROR,
ads.
WILLIAM W. GODDARD, PLAINTIFF IN ERROR.
} On appeal to the Supreme Court of the United States.

Afterwards, to wit, on the third Monday of October, in the term of October, eighteen hundred and seventy-one, the said George J. Foster, by Prichard, Choate & Smith, his attorneys, freely comes here into court and says, that there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the said Supreme Court of the United States, before the aforesaid justices thereof now here, may proceed to examine as well the records and proceedings aforesaid, as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

PRICHARD, CHOATE & SMITH,
Attorneys for Defendant in Error.

161 (Endorsed:) U. S. circuit court. George J. Foster, def't in error, ads. William W. Goddard, pl'ff in error. Joinder in error. Prichard, Choate & Smith att'ys for def't in error. Filed Oct'r 16, 1871.

162 *Bond for costs.*

Circuit court of the United States of America, for the southern district of New York, in the second circuit.

WILLIAM W. GODDARD, PLAINTIFF IN ERROR,
vs.
GEORGE J. FOSTER, DEF'T IN ERROR.

Know all men by these presents, that we, William W. Goddard, plaintiff in error, together with Lazarus Lissberger & Henry F. Hamill, of the city of New York, are held and firmly bound unto the abovenamed George J. Foster, def't in error, in the sum of sixty-two thousand one hundred and eighty-three $\frac{58}{100}$ dollars, to be paid to the said George J. Foster, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the fifteenth day of September, in the year of our Lord, one thousand eight hundred and seventy-one.

Whereas the above-named William W. Goddard hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the

judgment rendered in the above-entitled suit, by the judge of
163 the circuit court of the United States for the southern district
of New York, in the second circuit:

Now, therefore, the condition of this obligation is such that if the above-named William W. Goddard shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

W'M W. GODDARD. [L. S.]
HENRY F. HAMILL. [L. S.]
L. LISSBERGER. [L. S.]

Sealed and delivered and taken and acknowledged this 15 day of September, 1871, before me.

R. E. STILWELL,
U. S. Com'r.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

Henry F. Hamill and Lazarus Lissberger being duly sworn, each depose and say and each for himself saith, that he is worth the sum of sixty-two thousand one hundred and eighty-three $\frac{58}{100}$ dollars, over and above all his just debts and liabilities.

HENRY F. HAMILL.
L. LISSBERGER.

Sworn to this 15th day of Sept., A. D. 1871, before me.

R. E. STILWELL,
U. S. Comm'r.

(Endorsed:) U. S. circuit court. George J. Foster vs. Will-
164 iam W. Goddard. Bond for costs on writ of error. D. D. Lord,
att'y for Goddard.

Approved as to form, manner of execution, and sufficiency of sureties.
Sept. 15, 1871.

PRICHARD, CHOATE & SMITH,
Att'ys for Def't in Error.
EMERSON & PRICHARD,
For Pl'ff.

Approved.

SAM'L BLATCHFORD, *D. J.*

SEPT. 15, 1871.

Filed Sept. 15, 1871.

165 By the Honorable Samuel Blatchford, district judge, and one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to George J. Foster.

Whereas William W. Goddard has lately appealed to the Supreme Court of the United States at the city of Washington, in the District of Columbia, from a judgment rendered by the circuit court of the United

States for the southern district of New York, made in favor of you, on the fifteenth day of September, eighteen hundred and seventy-one, and has filed the security required by law:

You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, the fifteenth day of September, in the year one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-sixth.

SAM'L BLATCHFORD.

166 (Indorsed:) U. S. circuit court, southern district of New York. George J. Foster against William W. Goddard. Citation on writ of error. D. D. Lord, att'y for W. W. Goddard.

Due service of a copy of the within citation is hereby admitted.
N. Y., Sept. 15th, 1871.

PRICHARD, CHOATE & SMITH,
For Def't in Error.

Filed Sept. 15, '71.

(Indorsement on cover:) No. 416. William W. Goddard, plaintiff in error, vs. George J. Foster. S. New York, C. C. U. S. Filed 27 November, 1871.

○

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

U. S. Supreme Court.

William W. Goddard,
Plaintiff in error,

vs.

George J. Foster,
Defendant in error.

Brief for Plaintiff in Error.

No 181.

Abstract of Case.

Action for Foster's services as Goddard's agent at Valparaiso, in managing the business of ship *Harriet Erving* on her third voyage from Boston to that port.

1st count of declaration set out agreement by plaintiff below to manage the business, and to be responsible for one-fourth of losses and risks, for one-fourth of its net profits (p. 4, fol. 5, p. 3).

The other counts were on an implied agreement to pay what the services rendered were worth.

The plea was general issue, with notice that all the services were rendered under a contract, dated 7 May, 1849, which fixed the compensation, and that plaintiff had filed a bill in Equity in the First Circuit for what was due him under such contract and obtained a decree for the balance.

The cause was tried 19 December, 1870, before Hon. Samuel Blatchford.

Plaintiff produced in evidence an agreement between the parties made 24 June, 1845, by which he agreed to manage all defendant's business for a term of five years for one-tenth of the net profits. Another agreement, dated 7 May, 1849, by which he agreed to devote his whole time to the defendant's business for an indefinite term, receiving as compensation one-fourth of the net profits of such business as he should conduct to completion, having the right to withdraw at any time on such notice as would give defendant the full benefit of all his services for any voyage previously commenced (p. 9, fol. 20).

A letter from the plaintiff to the defendant of 22d February, 1850, advising of his intention to join Alsop & Co. on 1st January, 1851, but to manage the business as usual to 31st December, 1850, and to send another agent, as he could not properly and advantageously continue the agency after becoming a partner in the house (fol. 33).

Letters from defendant to plaintiff:

27th February, advising sailing of ship *Crusader* to be followed so shortly by the *Erving* as to admit of a third vessel in July (fol. 35).

27th March, that the *Erving* will be the next cargo (fol. 35, p. 14).

29th March, that the *Erving* is expected daily, and will be returned at once to make room for another vessel in July (fol. 35, p. 14).

13th April, acknowledges letter 22d February, and acquiesces heartily in plaintiff's decision to join Alsop & Co. (fol. 35).

11th May, that he does not want his ships loaded too deep, but prefers time for quick passage; expects by means of presses large quantities of wool (p. 15, fol. 35).

31st May, that the *Erving* had arrived.

29th May, advises as to market for cotton and cotton goods, gives list of those secured for the ships, and refers to a misfortune in having to repair her, and market for Valparaiso goods (p. 29, fol. 66); that the *Erving* will sail next day; that her cargo had advanced considerably since purchased, and information and directions concerning it (fol. 67, p. 27).

31st August, the *Erving* was towed out 21st inst. with a list of her cargo (fol. 38), also remarks concerning it (fol. 67, p. 27).

9th September, directs plaintiff, should a chance occur, to hereafter embrace all good opportunities to ship merchandise or purchase of others as was understood between them when plaintiff was in the States (fol. 38, p. 16).

11th October, that he intends to keep the *Crusader*, but two weeks, and hopes plaintiff will give both vessels great dispatch (p. 16, fol. 38).

11th November, sends advices in letter to Alsop & Co., as by receipt, plaintiff will have joined that house; that Mr. Erving, the new agent, would go out in following voyage of the *Erving*; asks plaintiff, as a favor, to advise him individually as before, and authorized him to draw for $10,000 (fol. 39, p. 16).

10th February, 1851, acknowledges letter, 25th December, 1850 and 3d January, 1851; is glad to learn safe arrival of the *Erving*, and pleased with her dispatch (fol. 42).

27th March, 1851, acknowledges his and Alsop & Co.'s letters, 16th and 25th January last, and will be greatly pleased to receive frequent private advices; Mr. Erving would return with Capt. Spavin, who was daily expected (fol. 42).

Also other letters plaintiff to defendant.

29th April, 1850, advises sending tobacco by the *Erving* (fol. 65, p. 26).

11th May, refers to note of cargo for the *Erving* (fol. 65, p. 26).

29th May, thanks defendant for kind expressions as to his joining the house, but the emolument is no better than with defendant; refers to Mr. Erving's coming out, but meantime he will exert himself in defendant's interest as before, and as if he had an agent on the spot (fol. 36); gives also advices for outward cargo of the *Erving* (fol. 65, p. 26).

29th June, requests written, formal, discretionary orders, in case defendant sends no agent (fol. 36).

28th August, knows only through Mr. Bartlett that the *Erving* was loading July 5th, and through Mr. Hobson that defendant intends to send out Mr. Erving, which he thinks necessary, and will serve him in every way; that he has begun contracting for wool for next season on same bases as last, and expects large profits (fol. 37, p. 15).

25th September, advises the *Erving* will take homeward copper, skins and wool (fol. 65).

14th October, expects list of the *Erving's* outward cargo by 26th October, inst., and advises preparations to return large quantities of wool (fol. 66, p. 27).

25th October, advises costs of *Erving's* return cargo, and sends market report (p. 27, fol. 66).

5th November, expects good sales from the *Erving* when she arrives.

19th November, the *Erving* had not arrived, but expects good sales from her (p. 27, fol. 66).

25th November, acknowledges defendant's letters, August 20 and 31, September 9 and October 11, and has noted contents and expects *Erving's* arrival before closing of mail (fol. 66).

25th December, the *Erving* arrived 8th inst., 108 days passage and memorandum of cargo per return (p. 16. fol. 39).

27th December, encloses invoices and bills of lading per *Erving* (p. 16, fol. 39).

3d January, 1851, the *Erving* sailed 7th inst., encloses her papers and will send wool invoice when received from Talcahuana (fol. 40, p. 17).

25th January, 1851, acknowledges defendants' letter 11th November, and has drawn $15,000, not doubting acquiescence; has worked hard for defendant, whose interest he still has much at heart, but recommends sending out Mr. Erving, as many advantages are perpetually occurring that a house cannot embrace. Will from time to time, write a private letter, but his new berth is very laborious, and he has wished himself back with defendant a thousand times. All defendant's correspondence will be managed by himself; asks defendant to write occasionally as he has time (fol. 41).

25th February, writes a few lines privately; has not much to say; Alsop & Co.'s letter contains abundant information; intentionally omits list of cargo (fol. 42); has been obliged to sell some goods low, because of competition (fol. 64, p. 26).

8th May, 1851, writes a few lines which would be out of place in correspondence with the house (fol. 43, p. 18).

17th May 1851, we are not writing to the States by this opportunity, and wishes defendant to keep this letter to himself (fol. 43).

Plaintiff introduced also, subject to defendant's exception, letters.

To Captain Spavin, 19 August, 1850, giving him the command of the *Erving*, and directing him to proceed to Valparaiso, where his agent, Mr. George J. Foster, or, in his absence, Alsop & Co. would dispose of outward cargo, attend to his wants and give further directions (fol. 37, p. 15).

Plaintiff to Captain Spavin, 27th December, 1850, directs him to proceed to Coquimbo and receive from Mr. Brauninger shipment of copper; thence to Talcahuan, and forward letters to Jose Galan, of Concepcion, and take all the wool he could carry ; in case of trouble about men, never delay the ship, but pay what is necessary and get ahead with voyage (fol. 40).

Plaintiff then put in evidence bill of lading, *Harriet Erving*, 3d voyage, dated Boston, 20th August, 1850. Merchandise to be delivered to George J. Foster, or, in his absence, to Alsop & Co. (fol. 43).

Two invoices of said cargo, dated Boston, 31st August, 1850, total cost with charge $179,492.14 (fol. 44, p. 18).

Also invoices, homeward cargo of the *Erving*, shipped by Alsop & Co.

One dated 27 December, 1850, for	$131,162 14
The other dated 17 February, 1851, for wool, shipped at Talcahuan	26,267 50
Total, both invoices	$157,429 54

(Fol. 45, p. 19.)

Also account sales outward cargo at Valparaiso:

To 31 December, 1850, net	$80,211 06
30 June, 1853	89,955 00
Total at Valparaiso	$170,166 06

Account sales at Lima:

To 31 December, 1851, net	$35,454 06
Total net sales	$205,620 06

These accounts were all signed by Alsop & Co., and included in the charges, their commission 4 per cent., on sales, 2½ per cent. for guaranty (fols. 46, 47, pp. 19, 20).

Plaintiff's counsel then read, subject to defendant's exception, as not admissible under the *quantum meruit* counts, the deposition of Edward L. Stevens, defendant's book-keeper, who produced accounts of the adventure by the *Erving*.

Cash outward cargo	$171,745 63
Net proceeds	205,620 74
Profit, 6 September, 1851	29 492 22

Cash, homeward cargo	$131,162 12
Net proceeds	208,006 84
Profit, 27 November, 1851	39,403 79
Total profit	$68,896 01

George J. Foster:

¼ outward	$7,375 55	
¼ homeward	9,850 95	
		$17,226 50

Int. to March, 1858:

Outward	$2,866 79	
Homeward	3,695 77	
		$6,662 56

Total with interest	$23,789 06

(Fol. 52, p. 22.)

Deposition, Robert Spavin, commanded the *Erving* on this voyage; reached Valparaiso 8th December, 1850; plaintiff was there and attended to the ship; took in 200 tons, only enough for ballast; thence was ordered to Coquimbo, which was to the north, for copper, and thence to Talcahuan for wool; found cargo ready in both places (fol. 49).

Cross-examined: Foster did not go to either place; I was at Coquimbo four or five days; did not take in all the copper in the yard, but what Brauninger gave me; Galan was sick at Concepcion; his agent put the wool on board; I sailed thence for Boston 27th or 28th February, 1851 (fol. 48, p. 20).

It was admitted:

That Plaintiff joined Alsop & Co. 1st January, 1851 (p. 21).

That defendant's business was thereafter conducted by Alsop & Co., as it had been previously (p. 21).

That Shirley Erving arrived at Valparaiso 1st November, 1857, as defendant's agent (p. 21).

That the accounts produced were rendered by Alsop & Co. (fol. 49, p. 21).

Plaintiff examined in his own behalf, testified (p. 22, fol. 53):

That before his first agency he had acted as supercargo for defendant. That the cargoes were always consigned to Alsop & Co., but he had a right to direct to whom they should be consigned (p. 28, fol. 68); being shown an amendment to his bill of complaint in the former action, striking out an allegation that he sold the cargoes and remitted the proceeds, and substituting an allegation, that he received the cargoes with instructions to pass them over to Alsop & Co. for sale, who sold them and purchased return cargoes, he said he did not remember such instructions, but thought the amendment was made by his counsel; being shown his affidavit to the amendment, he said he took it for a matter of form, that by the terms of his contract with Goddard, he was authorized to withdraw consignments from Alsop & Co.; his agency being intended to protect defendant from Alsop & Co., as well as others, that he thought he could do this as well after joining that house as before (fol. 70, p. 28).

That he did not go to Coquimbo or Talcahuano, because Alsop & Co. had proper agents on those places, who purchased the return cargoes (fol. 72).

That he considered nine-tenths of the work was done when the ship was despatched before first January, 1851 (fol. 73, p. 29).

The greatest part of his work consisted in deciding upon and forming the return cargoes or remittances, but he admitted that, as to this matter, the judgment of Mr. Riley, active partner of Alsop & Co., was as good as his (p. 29, fol. 73).

During his entire residence at Valparaiso he lived with Mr. Riley, free of expense (fol. 73, p. 29).

He gave the following testimony, subject to defendant's exception:

That after joining Alsop & Co. he transhipped a part of the *Erving's* cargo to Lima for sale, giving himself the order for transhipment (fol. 60, p. 25).

That Alsop & Co., in the course of their business, always sold at Valparaiso such goods as were consigned to them, and would not ship to other ports, without positive or discretionary orders from consignors. That goods received from Mr. Goddard on previous voyages had been sent to other places by his orders, but never without his express instructions (fol. 61, p. 25).

That an account sales by Alsop & Co., dated 31st December, 1852, purporting to be by orders of Shirley Erving, were not by Mr. Erving's orders, but his own (fol. 62).

That his services outside the contract were worth five per cent. on net sales of both outward and homeward cargo.

The Court having here ruled contrary to defendant's objection that services outside the contract had been shown (fols. 64, 65; p. 26).

Theodore H. Riley (p. 30, fol. 74) was managing partner of Alsop & Co. in Valparaiso from 1840 to January, 1851.

During all Foster's agency he resided in the domestic establishment of Alsop & Co., over which he, Riley, presided; at first, he thinks this was a compliment to Foster, but afterwards it was provided in their agreement with Goddard that his agent should live with them, free of expense (p. 30, fol. 74).

Goddard sent shipping documents to Foster, who always turned them over to Alsop & Co.; sales were made under his supervision, and sales at other ports depended upon his consent, and goods would not have been sent without positive or discretionary orders; Foster always informed us in advance of the ships' arrivals, of the return cargoes to be purchased, we furnished the requisite funds, and had a commission on purchases and sales (p. 30, fol. 75).

Q. What was the understanding between your house and Foster as to his completing the business of the third voyage after he joined the house (p. 30, fol. 75).

(Objection and exception by defendant fol. 78.)

A. He continued to superintend the business the same as before; I was aware of his doing so, and neither I nor any member of the firm made any objection; our advances to purchase return cargoes were often $200,000 to $300,000, and even more (p. 30, fol. 76).

Q. What is your judgment as to Foster's capacity and experience?

(Objection and exception, fol. 76, p. 30.)

A. This best answer I can give is that we invited him to join the house.

Q. $205,000 being net sales of the *Erving's* outward, and $208,000 of her homeward cargo, what, in your opinion, would be the balance of Foster's services as agent?

(Objection on ground of special agreement; overruled; exception; fol. 77, p. 31.)

A. I should say five per cent.; remittances in this trade are usually made by return cargoes, and the prosperity of the adventure depends as much upon one cargo as upon the other.

Foster did not go to Coquimbo or Talcahuano; all the cargoes in these placeswere bought by Alsop & Co.'s agents, who conducted the negotiations with the dealers, and if good bargains were made in copper, wool and goat-skins, they were made by these agents, and not by Mr. Foster.

Our house had a commission of one per cent. for purchasing, taking care of and shipping copper, and what Mr. Foster did about it was to give the order and approve the price, which was the market price (p. 31, fol. 78).

Plaintiff's counsel then offered a computation showing that one-fourth profits, without interest:

$15,864 71

5 per cent. on net sales.
$414,227 58

20,711 37

Plaintiff rests (p. 32, fol. 79).

Defendant's counsel then offered in evidence the record of an action in Massachusetts, brought by Foster against Goddard, to recover what was due to him under the two agreements of 1843 and 1849 (fol. 79), including the bill of complaint, various orders amending it; Goddard's answer; the Master's report, allowing to Foster one-fourth profits, *H. Erving's* third voyage; exceptions by Goddard to such allowance; the decree sustaining this exception, overruling others, and recommitting the report to be altered; the amended report and the decree confirming it.

The appeal, by both parties, to the Supreme Court, and the affirmance of the decree appealed from (p. 32, fol. 80).

Plaintiff's counsel objected to this evidence, and the Court excluded it as not a bar to any claim contained in the declaration, to which defendant excepted (p. 76, fol. 135).

Defendant's counsel then renewed the offer in bar of claim under the first count, but the Court excluded it on the ground that plaintiff made no claim under the first count, to which defendant excepted (p. 76, fol. 135).

Defendant's counsel then offered the evidence in bar of the cause of action sought to be established by the testimony of Stevens, and the agreement of May, 1849 (p. 76, fol. 135).

The Court excluded it, because there could be no such cause of action, defendant excepted.

Defendant's counsel then offered it in bar of all claim for services prior to 1st January, 1851.

Court excluded it, and counsel excepted (fol. 136, p. 77).

Wm. W. Goddard, for himself (p. 77, fol. 136); has long been engaged in commerce, and the trade with west coast South America.

Being asked whether he had any reason to suspect the competency of Mr. Riley, of Alsop & Co., plaintiff objects, and question excluded; defendant excepted (p. 77, fol. 137).

He engaged Mr. Foster as agent, because Alsop & Co. were all strangers; that if he had not had an agent he would have consigned direct to Alsop & Co., but in this case their other constituents would have had the benefit of his knowledge, and by having an agent, he also protected his goods from competition with similar goods from other consignors. He could also, through an agent, make purchases against competing orders sent to Alsop & Co. by other parties.

After Mr. Foster, he sent out Mr. Erving as agent.

Q. What compensation did you pay him (p. 77, fol. 138).

(Objection ; excluded ; exception).

Defendant's counsel then offered to show that he had sent out another agent in Foster's place, and equally good, to whom he paid a salary of $4,000 per annum.

(Objection ; excluded ; excepted ; fol. 138, p. 77).

Plaintiff's counsel admitted payment of the judgment in the first suit (fol. 139, p. 78).

Witness, being recalled, said he had paid for all services under the two contracts.

Being *cross-examined* by plaintiff, he said he had paid this in paying the judgment.

Defendant's counsel then renewed offer to prove record.

(Objection : excluded ; exception).

Testimony closed (fol. 140, p. 78).

Defendant's counsel moved, on all the testimony, for direction to the jury to find verdict for defendant on the grounds (p. 78, fol. 140)—

1. That claims in first count were for balance due on a copartnership, and could not be recovered, as there was no proof of any agreement to pay balance struck, or that any was struck.

2. That there was no evidence of any such agreement as was set out in the first count.

3. The plaintiff could not recover for services on *Erving's* 3d voyage under contract, 7th May, 1849, and there was no evidence of any other agreement applying terms of this contract to that voyage.

4. That plaintiff could not recover under common courts, because by contract, 7th May, 1849, defendant was entitled to all plaintiff's services to 1st January, 1851, which includes business not completed within that time, and without other compensation than was specified in the contract, and the law will not imply an agreement to pay more.

5. Because there was no evidence except the letters between the parties to prove an agreement to pay

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(Objection : excluded ; exception).

Testimony closed (fol. 140, p. 78).

Defendant's counsel moved, on all the testimony, for direction to the jury to find verdict for defendant on the grounds (p. 78, fol. 140)—

1. That claims in first count were for balance due on a copartnership, and could not be recovered, as there was no proof of any agreement to pay balance struck, or that any was struck.

2. That there was no evidence of any such agreement as was set out in the first count.

3. The plaintiff could not recover for services on *Erving's* 3d voyage under contract, 7th May, 1849, and there was no evidence of any other agreement applying terms of this contract to that voyage.

4. That plaintiff could not recover under common courts, because by contract, 7th May, 1849, defendant was entitled to all plaintiff's services to 1st January, 1851, which includes business not completed within that time, and without other compensation than was specified in the contract, and the law will not imply an agreement to pay more.

5. Because there was no evidence except the letters between the parties to prove an agreement to pay

more than was stipulated in said contract; that Foster's letter 22nd February, 1850, was a proposal to abide by the agreement until January 1851, and a severance afterward of the connection.

Goddard's acceptance made an agreement binding on both parties, as to continuance and termination of the contract.

This argument was not varied by subsequent correspondence. There was no correspondence or verbal communication, showing any agency other than under the verbal contract of 7th May, '49. All the correspondence shows that both parties understood that their relations under the contract of 7th May, '49, continued until 1st January, 1851; that was no evidence that after 31st December, 1850, plaintiff acted for defendant, except as partner of Alsop & Co., or that defendant assented to, or had notice of, his acting in any other capacity. Court refused motion, and defendant's counsel excepted (p.79, fol. 142).

Defendant's counsel then asked the Court to charge and instruct the jury as follows (p. 80, fol. 145):

I. To find a verdict for the defendant.

(The Court refused so to instruct the jury, to which refusal the defendant did then and there except.)

II. That the plaintiff cannot recover under or by virtue of the agreement introduced in evidence under the first count of the declaration.

(The Court so instructed the jury.)

III. That the plaintiff cannot recover in this action for services rendered in or about the third voyage of the *Harriet Erving*, prior to the 1st day of January, 1851, because, by virtue of the agreement of May 7, 1849, said plaintiff was bound to render such services for the consideration in said agreement mentioned.

(The Court refused so to instruct the jury, to which refusal the defendant did then and there except.)

IV. That there is no sufficient evidence to establish any employment of the plaintiff by the defendant in or about the business of that voyage, after the 31st day of December, 1850, except as a member of the house of Alsop & Co., and that for services rendered by such firm the plaintiff cannot recover in this action.

(The Court refused so to charge the jury, to which refusal the defendant did then and there except.)

V. If the two last preceding instructions shall be given, then the Court is further requested to direct the jury to find a verdict for the defendant.

(The last two preceding instructions requested were not given.)

VI. If the Court shall decline to instruct the jury to find a verdict for the defendant, or to give the instructions embodied in the fifth request, and shall hold that is evidence from which they may infer the employment there by the defendant of the plaintiff in and about the business of the third voyage of the *Harriet Erving*, after the 31st of December, 1850, then the Court is requested to instruct them that, inasmuch as the plaintiff has expressly sworn that nine-tenths of his services concerning that voyage were rendered before January 1st, 1851, but one-tenth of the value of his entire services in respect to that voyage can be recovered in this action.

(The Court refused so to instruct the jury, to which refusal the defendant did then and there except.)

VII. In estimating the value of the services of the plaintiff, the jury must entirely disregard the proof of profits made by the defendant from the voyage of the *Harriet Erving*.

(The Court so instructed the jury.)

IX. The Court is requested to charge that if the jury shall find that an agreement, substantially like that averred in the first count of the declaration, was entered into between the plaintiff and defendant, such agreement constitutes them partners in the adventure of the third voyage of the *Harriet Erving*, no part of the profits of which adventure can be recovered in this action without proof of a balance struck, and a promise by defendant to pay the same to the plaintiff, and that there is no sufficient evidence of such promise (p. 81, fol. 147).

(The Court refused so to instruct the jury, to which refusal the defendant did then and there except).

X. The Court is also requested to charge that if the jury shall find that an agreement, substantially like that set out in said first count, was made between the plaintiff and defendant, whereby the former was to take the risk and perform the services by him alleged to have been rendered, in and about the third voyage of the *Harriet Erving*, in consideration of receiving one-fourth of the net profits of the said voyage, the said plaintiff is not entitled to recover the value of said services under either of the other counts of said declaration, but can, as compensation for said services, only recover his proportion of the profits of said voyage in some appropriate action.

(The Court refused so to instruct the jury, to which the defendant did then and there except).

XI. That in order to recover, the jury must be satisfied that plaintiff was employed under some agreement other than that of 7th May.

(The Court refused and defendant excepted).

His Honor, Judge BLATCHFORD, then charged the jury as follows (p. 81, fol. 148):

Gentlemen of the jury:—It is a subject of congratulation, at this stage of this case, that the thorough discussions to which you have listened on the part of counsel, make it unnecessary to detain you more than a very short time in the observations I have to make.

It has been seen by you when the relations between these parties commenced. This agreement of 1843 was to last five years. At the expiration of this time Mr. Foster returned from South America, and while here he made this new contract of 1849. Notice of the termination of this last contract was given by Mr. Foster in February, 1850, and was received by the defendant in April of that year. The relations under the contract to its close, on the 31st December, 1850, you have learned. Then follows the constant correspondence on the part of Mr. Foster, to obtain a settlement, and then the result of the litigation in Boston, in which one party resisted and the other claimed directly, a compensation for this third voyage of the *Harriet Erving*, which is now before you for solution. That suit finally ended by the Supreme Court at Washington deciding against the claim of Foster, and then, as early after as possible, this suit was commenced, showing, on the part of Mr. Foster, nothing in the shape of action or inaction, by which any consideration of his case in this suit ought at all to suffer prejudice at your hand, and nothing, on the other hand, in the way of prejudice, against Mr. Goddard, from the same circumstances, because he contended for what he believed, and what his counsel believed, to be his right in respect to the matter of the third voyage of the *Harriet Erving*. Neither party is in any manner to suffer any prejudice in this case by the lapse of time which has taken place.

I instruct you, gentlemen, that Mr. Foster is entitled to recover in this case such sum as the reasonable *quantum meruit* value of his services upon the evidence, you may regard to be proper (p. 82, fol. 150).

(To which instruction the defendant's counsel did then and there except.)

That includes a consideration by you of what his services were, the entire scope of the trade, and Mr. Foster's qualifications for those services at the time he rendered the services, in reference to this third voyage of the *Harriet Erving*, and the consideration of how much these services were, in bulk or in value, before the 1st of January, 1851, and the consideration of the extent of these services after that date, and whether they are to be diminished after by any payment or allowance which ought to be charged against Mr. Foster, because of any compensation he may have received as a member of the firm of Alsop & Co.

The whole question is one of fact for you to pass upon, as men of judgment and intelligence, and upon the evidence applying your best faculties to it. If you arrive at any sum which you regard as proper for the value of these services, then Mr. Foster is entitled to interest on that sum, at the rate provided by law of the State of New York, 7 per cent. per annum, from the time of the commencement of this suit. In round numbers, you may take the time as eight years and a quarter. He is entitled to the rate of the city of New York, because, as I said, when this suit was brough here in the city of New York, Mr. Goddard had th privilege of stopping the interest by tendering or paying into the Court the proper sum.

(To which instruction, that the plaintiff is entitled to interest, at the rate of 7 per cent. from the commencement of the suit, the defendant did then and there except (p. 82, fol. 151).

Now, gentlemen, in order to put this case in proper shape, I shall, in my further instructions to you, merely pass upon the general requests to charge which have been made to me. If you find the plaintiff performed any service, in respect to the third voyage of the *Harriet Erving*, which have been given in evidence, then he is entitled to recover, in this action, a compensation for such services as you shall find the services to be, and as you shall find the compensation to be proven, in your judgment, as a reasonable compensation, taken into consideration on this subject, the whole evidence in the case in regard to the reasonable worth of the services, and the evidence given by Mr. Foster, and the evidence given by Mr. Riley, and the evidence given by Mr. Goddard, the rates of compensation specified in the two contracts, which have been put in evidence here, in view of all the circumstances connected with these rates, and the consideration that induced their establishment, as they have been shown to you by the evidence.

(To which instruction, commencing with the words "If you find the plaintiff performed any services," and ending with the words, "by the evidence," and to each and every part thereof, the defendant did then and there except, p. 82, fol. 152).

In estimating the rate or sum of such reasonable compensation to the plaintiff, in respect to his services in relation to the third voyage of the *Harriet Erving*, you may take into consideration the rate which the parties had fixed, in their previous relations, in respect to similar services, as well as the rates given, as reasonable, from the witnesses speaking of the same, and give such sum as you shall judge a reasonable compensation for the actual services of the plaintiff in respect of the third voyage of the *Harriet Erving*, to be paid by the defendant under all the circumstances of the services, and their performance shown in the evidence. The only qualification I have to make, in regard to that, is, that in looking at this sum, fixed by the previous relations, you must take into consideration precisely what the previous relations were. You must take into consideration the facts that the compensation of one-tenth and one-fourth were based upon the risk and responsibility on the part of Foster, which did not exist in respect to the third voyage of the *Harriet Erving*, and all other circumstances which led to the fixing that sum, as a measuring, not merely of the value of Mr. Foster's services, but of the estimation in which Mr. Goddard held him as agent.

(To which instruction, beginning with words, "In estimating the rate or sum," and ending with the words, "Mr. Goddard held him as agent," and to each and every part thereof, the defendant did then and there except, p. 83, fol. 153).

The other propositions, submitted on the part of the plaintiff, which I have not affirmed, are considered as disaffirmed (p. 83, fol. 153); and so in respect to the request made by the defendant, as I state the entire recovery is put upon a *quantum meruit* what Mr. Foster reasonably deserved to have for the services; and, therefore, I charge you that the plaintiff cannot recover under and by virtue of the agreement introduced under the first count, which was a specified agreement for one-fourth of the profit. I also charge you that the plaintiff is not entitled to recover any portion of the profits realized on the third voyage of the *Harriet Erving*. I also charge you that, in estimating the value of the services of the plaintiff, you must entirely disregard the proof of the profits made by the defendant on the third voyage of the *Harriet Erving*. I also charge you that, to recover any compensation whatever for services by him performed in and about the said voyage, the plaintiff must satisfy you, by the evidence in the cause, that he was employed by the defendant to peform some service by some agreement distinct and independent from that of May 7, 1849, because the agreement of 1849 is entirely out of the case, and those services, in reference to the *Harriet Erving*, depend entirely upon another agreement; that agreement, I charge you, as matter of law, as one drawn from correspondence between the parties, you are bound to find (p. 83, fol. 154). The Court instructs you, as a matter of law, that there was an agreement between these parties for the performance by Mr. Foster of such services as he rendered in respect of the third voyage of the *Harriet Erving*, to be compensated for at such rates as these services reasonably deserved.

(To which instruction, commencing with the words, "That agreement," and ending with the words "reasonably deserved," the defendant's counsel then and there excepted, p. 83, fol. 155.)

These are all the instructions I think it necessary to give you; all the other requests are considered as refused.

(Defendant's counsel duly excepted to his Honor's refusal to charge the points for defendant as aforesaid, as well as to the portions of the charge hereinbefore specified, p. 83, fol. 155.)

One of the jurors thereupon asked whether there was any evidence showing the amount of commissions of the third voyage of the *Harriet Erving*, which Alsop & Co. received after Mr. Foster became a member of that firm?

(Mr. Evarts.) There was $150,000 of gross sales after he went into the house, and on which there was a commission of 4 per cent. for selling and 2½ per cent. for guarantee. On the homeward cargo they received one per cent. for the purchase of copper, 2½ per cent. on the purchase of hides, and 5 per cent. on the purchase of wool, out of which to pay 2½ per cent., and nothing on the bullion.

His Honor, the Judge, thereupon gave the figures, as follows:

Entire proceeds on the sale of the outward cargo at Valparaiso and Lima of the *Harriet Erving*	$205,620 74
The entire net proceeds of the sale of the homeward cargo of the *Harriet Erving*	$208,606 84
Total	$414,227 58

Upon which 5 per cent., according to one of the witnesses, would make $20,711.37.

Plaintiff's counsel then stated that of the outward cargo only $96,000 worth were sold prior to January 1, 1851. That is the gross sales.

His Honor then stated: It may as well be stated that it has been proven that the net proceeds of the cargo in Valparaiso was $205,620.27; that the $96,361 sold prior to January 1st was the gross sales. The net proceeds of those sales of $963.61 is $80,211, the amount realized prior to the 1st of January, 1851.

One of the jurors then asked whether the jury are to take into consideration the fact that, by the settlement of this account up to 1862, the date of the commencement of this suit, the plaintiff loses interest? And the Court said that they were not; and the jury thereupon rendered a verdict in favor of the plaintiff for $29,407.70 (p. 84, fol. 157).

Statement of Errors relied upon.

I.—Admission of evidence of Edward L. Stevens, giving statement of *Erving's* third voyage (p. 21, fol. 50).

II.—Admission of plaintiff's evidence as to conversation between himself and defendant, as to his continuing to act as agent after joining Alsop & Co., said conversation being previous to contract of 7 May (p. 23, fol. 54).

III.—Admitting plaintiff's evidence as to what arrival was to be first expected on the 9th February, 1850 (p. 24, fol. 57).

IV.—Admitting plaintiff's evidence of his own services as to *Erving's* third voyage after he had joined Alsop & Co. (p. 25, fol. 60).

V.—Admitting plaintiff's testimony that a transhipment to Lima of a part of cargo on *H. Erving's* third voyage, was not done by him on account of Alsop & Co., but in some other capacity, and that Alsop & Co. never made transhipments of consignments to other ports, several exceptions (p. 25, fols. 60, 61).

VI.—Admitting plaintiff's evidence as to value of his own services to *Harriet Erving's* third voyage (p. 26, fol. 64).

VII.—Admitting Mr. Riley's evidence as understanding between him and plaintiff, as to plaintiff's continuing to act for defendant after joining Alsop & Co. (p. 30, fol. 75).

VIII.—Admitting Riley's testimony as to plaintiff's capacity and experience (p. 31, fol. 76), and as to value of his services to the *Erving* on this voyage (p. 31, fol. 77).

*

IX.—Refusing to admit in evidence the record of judgment in Massachusetts (p. 32, fol. 80, p. 77, fol. 136).

X.—Refusing to admit evidence that defendant had engaged another agent who succeeded plaintiff, and was equally capable, for a salary of $4,000 (p. 77, fol. 138).

XI.—Refusing to direct the jury to find a verdict on all the testimony, in favor of defendant, on the grounds (p. 78, fol. 140).

That claim under first count was on a copartnership, and there was no evidence of balance struck (fol. 140).

That there was no proof of such agreement as alleged in first count (fol. 140).

That no recovery could be had under agreement of 7 May, '49, and there was no evidence of any other (fol. 140).

That no recovery could be had under *quantum meruit*, because under said contract defendant was entitled to all defendant's services to 1st January, 1851, without other compensation than was stipulated in the contract (fol. 140). And that there was no evidence of an agreement to pay for the services beyond the compensation stipulated in the contract (fol. 141).

That plaintiff's letter, 22 February, 1850, was an agreement to abide by contract to 1 January, and then to terminate it, which was made binding by defendant's acceptance (fol. 141).

That this agreement was not varied by subsequent correspondence (p. 79, fol. 142); on the contrary the correspondence shows understanding that the relations under the contract were to continue until 1st January and then terminate, and such was the adjudication in the Massachusetts suit (p. 79, fol. 142).

That there was no evidence that after 1st January, 1851, plaintiff acted for defendant in any other capacity than as Alsop & Co. (fol. 142).

XII.—In refusing to instruct the jury as follows (p. 81, fol. 144).

To find a verdict for defendant, (fo.144).

That plaintiff could not recover for services on the third voyage, *H. Erving*, because by agreement 7th May, 1849, plaintiff was bound to render these servises for a stipulated compensation (fol. 145).

That there was no evidence of plaintiff's employment of defendant after 31st December, 1850, except as a member of Alsop & Co. (fo. 145.)

That if plaintiff might, under the court's ruling, recover for services after 31st December, 1850, such recovery should be limited to one-tenth of entire services, as he swore that nine-tenths of the services had been rendered before this date (p. 81, fol. 146).

That no profits could be recovered under any agreement similar to that alleged in the first count, without proof of balance struck and agreement to pay, of which there was no sufficient proof (p. 81, fol. 147).

That if jury found an agreement like that alleged in first count, plaintiff could not recover under any of the other counts, but was limited to a recovery of profits in some other appropriate action (fol. 148).

That, to entitle plaintiff to recover, the jury must be satisfied from evidence that he was employed by defendant under some agreement distinct from that of 7th May, 1849 (p. 81, fol. 148).

Courts Error.

XIII.—In charging the jury that plaintiff was entitled to recover such sum as his services were reasonably worth (p. 82, fol. 150).

That he was entitled to recover interest at seven per cent. (p. 82, fol. 151).

That if they found that plaintiff had performed any service to the *Erving* on the 3d voyage he was entitled to recover such amount of compensation as upon all the evidence they should think reasonable (p. 82, fol. 152).

That in estimating such compensation they might consider the rates fixed by the parties in their previous relations, as well as those stated by the witnesses to be reasonable, taking into consideration, however, the responsibility assumed by plaintiff in his previous relations (p. 82, fol. 152).

That the jury were bound to find, as a matter of law, drawn from the correspondence, that another agreement, distinct from that of 7th May, 1849, was made between the parties (p. 83, fol. 155).

SUMMARY.

This action was for services rendered at Valparaiso to the ship *Harriet Erving*. It was partly on an express, partly on an implied agreement.

The parties had made a written contract, dated 7th May, 1849, by which plaintiff was to manage all defendant's business at Valparaiso, and bear one-fourth of losses, for one-fourth of the profits of all such business as he should conduct to completion. This contract he had the right to terminate by notice.

Accordingly, by letter of 22d February, 1850, he gave notice that he should join Alsop & Co. on 1st January, 1851; that he would manage the business as usual until 31st December, but could not do so thereafter.

Defendant acquiesced in this notice by letter 13th April, 1850.

The ship *Crusader* arrived at Valparaiso in June, 1850, and plaintiff, in a suit in Massachusetts, brought on the contract, recovered one-fourth of the profits of her adventure.

The *Erving* was, in February, on her way from Chili to Boston, but owing to an accident and the consequent need of repairs, was unable to leave Boston until 31st August, and, making a long passage, did not reach Valparaiso until 8th December, and did not leave Chili with her return cargo until 27th February, 1851. Plaintiff claimed one-fourth of profits of this adventure in the suit above mentioned. The claim was allowed by the master, but afterwards rejected by the Circuit Court, and finally by this Court, as business not completed.

The only communication between the parties was by correspondence, none of which, as defendant insists, shows any new agreement different from that of May 7, as to plaintiff's services or compensation.

Contrary to defendant's objections, the Court below admitted evidence of conversations varying the written contract, also of the nature of plaintiff's services, and estimates of their value.

Excluded evidence offered by defendant of the salary actually paid by him for similar services.

Refused to submit to the jury to find whether there was any contract distinct from that of 7th May.

Directed them to find the existence of such an agreement, as matter of law, derived from the correspondence, and to allow such compensation as they thought reasonable for the services rendered, with seven per cent. interest.

And excluded the record of the former action in which the rights of the parties had been adjudicated.

Other points were taken which appear in the foregoing abstract and statement, and the jury found for plaintiff a sum equal to five per cent. on gross sales of both outward and return cargo, with $\frac{7}{100}$ interest.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

U. S. Supreme Court.

William W. Goddard,
Plaintiff in error,

vs.

George J. Foster,
Defendant in error.

Points of plaintiff in error.

I.—The judgment cannot be upheld on the express contract of 7 May, 1849.

All claims under this contract were discharged by payment of the decree in the former action; moreover, the business of the *Erving's* third voyage was not completed so as to entitle plaintiff to the compensation provided. This business cannot in any sense be held as completed until the ship left on her homeward voyage, which was not until 27th February, 1851 (fol. 48).

If the recovery could be sustained on the express contract of 7 May, 1849, it was manifest error to exclude the record of judgment in the former action.

The only claim, under an express contract, is in the first count, all the others being on an implied agreement.

This first count was ruled out and abandoned at the trial, the recovery being allowed exclusively on the implied agreement.

The court below allowed the recovery on an implied agreement, without submitting to the jury to find whether such agreement was made, but charging them to find it as matter of law.

The judgment should therefore be reversed, unless the evidence not only warranted the finding of an implied agreement, but was so decisively in favor of such a finding, that the Court would have been justified in setting aside a contrary verdict.

II.—No contract can be implied during continuance of the agreement of 7th May, because this agreement required all plaintiff's services for a definite compensation. This contract and an implied agreement are utterly inconsistent.

III.—The agreement of 7th May continued in force until 31st December, 1850, so that no claim can be maintained under an implied agreement for any services previous to this date.

This termination was fixed by plaintiff himself in his letter of 22d February, 1850, and was assented to by defendant in a letter of 13th April, 1850.

Plaintiff, in his letter, expressly agreed to manage the business as usual until 31st December.

This could mean nothing less than that he would perform the duties required by the contract and for the compensation specified.

Without this phrase the contract would have remained obligatory until terminated by the notice, and if the contract was binding as to the duties it must have been equally so as to the compensation.

IV.—Plaintiff's duties after the notice of 22d February, were not limited to closing up voyages previously begun.

The contract of May, 1849, bound him to manage all business during its continuance.

The notice of 22d February fixed its termination for 31st December, not only without notice that any services rendered in the interval were to be excluded from its terms, but with the express assurance that the business (including, of course, all of it) would, during this period, be managed as usual.

No restriction of plaintiff's duties, to the closing up of old voyages, can be implied from the clause in the contract requiring plaintiff to give such notice of withdrawal as would allow full benefit of his services to voyages already begun. This clause was intended for defendant's protection against too short a notice, but did not preclude plaintiff from giving a longer notice if he chose.

V The state and prospects of the business, when plaintiff gave his notice of withdrawal, forbid any construction that would limit his duties to the closing up of business previously commenced.

Such a construction would necessarily presume an intention, on plaintiff's part, to exclude from the terms of the agreement the adventure by this outward voyage of the *Erving*, and perhaps also an adventure by the *Crusader*, of which plaintiff actually received a share of the profits as made under the contract.

The notice of withdrawal was mailed 22 February, received about 1st April (fol.), acknowledged and assented to 13th April.

The *Crusader* did not sail from Boston until 27th February, and left Valparaiso on the 10th June, but plaintiff's notice of 22d February might have reached defendant before her departure if she had met with the same delay as the *Erving*.

In February, the *Erving* must have been on her homeward voyage; she was expected at Boston about first April, and to be sent back at once, so as to make room for a third vessel in July (p. 14, fol. 35).

Plaintiff began advising as to her outward cargo as early as 29th April. He expected a list of her outward cargo by 26th October, and to make good sales of it (fol. 66, p. 27).

He expected arrival of the ship by closing of mail on 25th November (p. 27, fol. 66); her return cargo was ready in November (p. 24, fol. 58). And yet plaintiff knew from defendant's letter of 31st May, that the ship required repairs (p. 29, fol. 67), and that her departure from Boston had been delayed until 21st August (p. 16, fol. 38).

If the *Erving* had arrived at Boston as early as on 22d February, plaintiff had good reason to expect there was every probability that she would be at Valparaiso in ample time for completion of her business, so as to entitle plaintiff to a share in the adventure, especially as he would receive a list of her cargo in advance of her arrival, and her entire cargo might be sold before she was ready to return (p. 24, fol. 57).

The supposed limitation of plaintiff's duties after his notice of withdrawal, is thus inconsistent with the purpose clearly evinced by the length of that notice, to save his rights under the contract, in adventures expected to be sent out a considerable time afterwards.

VI.—Even though plaintiff could not share in the profits of this voyage of the *Erving*, he was, nevertheless, bound by his contract to attend to all her business.

The terms of his contract expressly obliged him to attend to all business, and excluded him from the profits of such as he did not complete.

To imply an agreement to pay for such services rendered under the contract, because the contract itself provided no such compensation for them, is virtually to set that contract aside.

The contract was, when made, very advantageous for the plaintiff. He could easily protect himself against any casual disadvantage caused by the late arrivals of new adventures, by the fixing, as he had a right to do, the time and terms of his withdrawal.

But the chance of any loss from this provision was compensated by the large share allowed on completed business; it was more than double his compensation under the agreement of 1843. Defendant had also taken upon himself the entire expense of plaintiff's living (p. 30, fol. 74), and the remuneration was such, that plaintiff himself admitted it to be equal to what he received as a member of Alsop & Co., F to G, 29th May (p. 15, fol. 36), and that the duties of his new place were so much more laborious, that he had often wished himself back (F to G, p. 17, fol. 41).

The duties of the agency were in fact very light. All sales of outward cargoes were made by Alsop & Co.

The return cargoes were always composed of the same articles, copper, skins and wool; and no judgment was required, except in making cheap purchases. Plaintiff did not, in the entire term of his second agency, visit Coquimbo or Talcahuano, where these cargoes were bought and taken on board. The purchases were made exclusively by Alsop & Co.'s agents in those places, who alone deserved all the credit of good bargains (p. 31, fol. 78).

And, although the principal difficulties that the ships would meet with were to be expected in these ports, plaintiff never went there to give his assistance or protect the captains from imposition; but advised, in case of trouble, to pay what was necessary and get ahead (p. 17, fol. 40).

Plaintiff's own description of his services is extremely indefinite (p. 23, fol. 55).

He attended, as he says, to discharge of outward cargoes, including, of course, lighters; sent market reports and notes of cargo for every vessel (these were only two); overlooked all sales (no difficult or responsible duty, as they were made by Alsop & Co.); suggested return cargoes (copper, skins and wool, as much as could be taken), and attended to everything (but he does not specify what).

Whether the mode of compensation was favorable or otherwise, plaintiff agreed to it, after full reflection and an experience of five years in the business.

VII.—Plaintiff's action in relation to the business, from the sending of his notice in February up to the termination of his agency on the 31st December, shows an understanding that his duties, under the agreement, comprised all adventures, new as well as old.

All his services were rendered without authority instruction or notice from defendant, except such as was to be inferred from the contract itself.

Plaintiff's notice of 22d February was received about 1st April, and acknowledged April 13 (p. 14, fol. 35).

Defendant's only letters after this date were, 11 May (p. 14, fol. 35); 31 May, August 20, August 31 (p. 27, fol. 67); from none of these is it possible to infer any request for advice as to outward cargo, or authority to purchase a return cargo for the *Erving;* but plaintiff begins advising as to the *Erving's* outward cargo as early as 29 April (p. 27, fol. 65); gives further advices in a letter of 11 May, and more complete memorandum in letter of May 29 (p. 27, fol. 65). He begins purchase of return cargo before 28 August (p. 27, fol. 65); states generally what it will consist of, in letter, 25 September; refers to his expectation of a list of his outward cargo in letter, 14 October; in that of 25 October gives cost of part of return cargo, and refers to prospects of sales of outward cargo, in letters of 5, 19 and 25 November (p. 27, fol. 66).

These letters were evidently written as part of his duties under the contract of May, and could not have been prompted by any new retainer from the defendant.

VIII.—Plaintiff must have understood that his services to the *Erving* on this voyage were rendered in performance of the agreement of 7 May, 1849; because, in his former action on this contract, he made these services the ground of claim for a share in the profits of the adventure.

1 Clifford, 158.
1 Black, 506.

IX,—If the notice of 22d February is susceptible of a construction limiting plaintiff's duties to adventures previously commenced, it is at least equally capable of a construction binding him to manage all defendant's business on the terms of the contract; and as plaintiff might have avoided the ambiguity, this latter construction should be adopted.

X.—No claim can be maintained for services rendered after 31st December, 1850.

All services on which plaintiff's claim is founded were rendered before this time; the *Irving* had left Valparaiso for Coquimbo and Talcahuano, where her cargo had been previously got ready by Alsop & Co.'s agents. Plaintiff did not go to either of these ports; the captain was left, while there, to his own management, and nothing whatever was done by the plaintiff in relation to ship's business, except the sale of her outward cargo, a small lot of which was sent to Lima for a better market. Plaintiff's claim for services, after 31st December, depends upon these two transactions, viz.: sale of outward cargo and transhipment of a part of it.

Plaintiff's private letters, written after he had joined Alsop & Co., were not services in a capacity distinct from his connection with that house, but were understood, both by him and the defendant, to be friendly and gratuitious acts of the plaintiff, by and as a member of the firm (see F to G, p. 17, fol. 41).

Three such letters only were sent, viz: 25th February, '51 (p. 17, fol. 42); 8th May, '51 (p. 18, fol. 43); 17th May, '51 (p. 18, fol. 4[illegible]); all of them were letters of mere civility, containing no information relating to the *Harriet Erving*, or any other subject of the least commercial importance.

XI.—The sale of so much of the *Erving's* outward cargo as was made after 31st December was not a service for which plaintiff can claim any compensation, beyond what was due to the firm of which he had become a member.

Alsop & Co. had accepted a consignment of the cargo, and this acceptance entitled defendant to the full services of every partner in the house. If plaintiff, after becoming a partner, had the exclusive charge of these sales, it was only as succeeding Mr. Riley in the active management of the house; he is not shown to have rendered any sevices in disposing of that part of the cargo which was sold at Valparaiso, which he did not perform in reference to other consignments from other parties.

But, however special or valuable his services may have been, they did not exceed his duties under his newly assumed office of consignee, and were fully compensated by the large commission paid to Alsop & Co., in which he participated.

1 Clifford, 185.
1 Black, 517.

XII.—The transhipment to Lima will not justify an implied agreement for compensation beyond the commission payable to Alsop & Co. as factors. Plaintiff, by his letter of withdrawal, had terminated all relations with defendants, except those which held as a partner of Alsop & Co., this transhipment could not have been directed in any other capacity than as one of the firm, unless some new retainer was given him by defendant either expressly or by implication. As the goods were shipped without even notice to the defendant, no such retainer has been shown or can be implied.

On plaintiff's own version, the shipment was merely an unauthorized act performed by him as a member of the firm, which, from his knowledge of defendant's wishes, derived from previous relations, he knew would be approved of; and, as it resulted profitably defendant had no occasion to object to it if he could, but the act gave plaintiff no ground for claiming extra compensation.

But, in fact, this shipment was not unauthorized, nor was it made by plaintiff in his capacity as agent, but as consignee under express authority from defendant.

During plaintiff's agency it was understood between him and defendant that he should direct shipments to other ports; this had been verbally agreed upon between them, G to F, 9th September, 1850 (p. 16, fol. 38). Plaintiff had, during his agency, sometimes made such shipments to Lima and other places (p. 25, fols. 61, 62). So long as his agency continued, he could have acted under this authority, and required no other.

He understood, however, that this authority would terminate with his agency, on his joining Alsop & Co.; he therefore requested formal discretionary orders, applicable after the termination of his agency.

He writes—

22d February, 1850. I advise your having an agent. *If, however, you send no one, your instructions should be discretionary* (p. 14, fol. 34). Again, on 29th June, 1850, he writes, *in case you send no one out here, I wish you to send me, in writing, formal discretionary orders with regard to operations* (p. 15, fol. 36).

In answer to these applications, defendant writes, 9th September, 1850: I take this opportunity of expressing my desire that you will *hereafter embrace all good opportunities by shipping our merchandise, or purchasing of others,* as we understood between ourselves, when you were last in the States (p. 16, fol. 38).

It is evident that this authority must have been intended for Alsop & Co., because it was not limited to 31st December, when the plaintiff's agency was to terminate, and it could have had no other purpose than to give an authority which would extend beyond that which plaintiff derived under the relations then existing between him and the defendant.

XIII.—Plaintiff's continuance in the agency, after he had joined Alsop & Co., was contrary to the terms of his letter of 22d February.

It was contrary, also, to his own understanding of the duration of his powers and duties, as shown by his application for discretionary orders and it was utterly inconsistent with the new relations and duties devolving upon him as a partner of Alsop & Co.

The articles of that copartnership strictly prohibited such relations as had existed between him and defendant.

The performance of plaintiff's duties, as defendant's agent, were incompatible with those devolving upon him as a member of the firm.

F to G, 22d February.

One of the main purposes of the agency was to afford defendant a medium of communication not connected with Alsop & Co., by which he might protect himself from competition, both in sales and purchases, with other constituents of that house, and keep his knowledge of the trade for his own exclusive benefit (p. 77, fol. 137.)

Plaintiff admits that, as agent, it was his duty to protect defendant against Alsop & Co. as well as against others (p. 28, fol. 70).

The principal object of the appointment was not to secure to defendant the benefit of plaintiff's supposed capacity for business, for plaintiff acknowledges that his judgment was not superior to that of Mr. Riley (p. 29, fol. 73), who had been active partner of the house since 1840 (p 30, fol. 74).

If the object of the agency had been to secure the benefit of plaintiff's skill and capacity, that object would have been attained, after plaintiff had joined Alsop & Co., by making the consignments to that house; but it was well understood that, notwithstanding all plaintiff could do as a partner of Alsop & Co , a new agent was required; this necessity was recognized by plaintiff himself, as is shown by his letters, 22 February (p. 14, fol. 33), 29 May (p. 15, fol. 36), 29 June (p. 15, fol. 36), 28 August (p. 15, fol. 37), 25 January, '51 (p. 17, fol. 41).

It was felt by defendant also, as appears by his subsequent appointment of Mr. Erving.

XIV.—There was no evidence of any modification of the contract of 7th May which warranted the Court below in directing the jury to find that the services for which judgment was claimed were outside of the express contract, or rendered under an implied agreement for a reasonable compensation.

All communications from which such modification or implied agreement are to be inferred were in writing. These were entirely inconsistent with the termination of the express contract before 31st December, 1850 and with the continuance after that date, of any relations between the parties, except such as grew out of plaintiff's connection with the factors to whom plaintiff's shipments were consigned.

The judgment should therefore be reversed, for the error committed in withdrawing the evidence from the jury (p. 83, fol. 154.)

XV.—If, as above submitted, the existence of an implied agreement was inconsistent with relations between the parties under the express contract, the Court erred, in directing the jury to find an implied agreement between the parties, in admitting evidence as to services rendered by plaintiff, whether before or after 31st December, and as to the value of such services, and in refusing to direct a verdict for defendants; the judgment should, therefore, be reversed on all the exceptions stated.

XVI.—Even if there was evidence proper to be submitted to the jury as to a modification of the express contract, or from which an implied agreement might be inferred, the Court erred, nevertheless, in ruling that an implied agreement had been proved, and in directing the jury to find such agreement as matter of law, and the judgment should be reversed on the exceptions ~~Nos. 8 and 20~~.

p 82. fo 150
p 83. fo 155

XVII.—If the evidence justified the Court in directing the jury to find an implied agreement, it was error to exclude defendant's evidence showing the subsequent engagement of an agent as capable as plaintiff for a salary of $4,000 per annnm, and the judgment should be reversed on exception ~~No. 12~~. p. 77. fo. 138.

XVIII.—The Court erred also in refusing to charge, that if the jury found an agreement such as that set out in the first count, it was a partnership, and could not be recovered on ~~Exception No. 18~~.

And that if they found such an agreement, the plaintiff could not recover under the other counts ~~Exception No. 19~~.

These two propositions are manifestly correct and by their denial the jury have been allowed to find a verdict under an implied agreement on testimony of an express agreements, utterly inconsistent with an implied agreement, and confessedly not in itself a ground of recovery in this action.

p 78. fo. 140.
p 81. fo. 147.

XIX.—The Court erred also in excluding the record of the former suit between these parties.

It was virtually a complete adjudication of all the issues.

It was competent evidence to show that all the services for which plaintiff claimed compensation in this action were rendered under the express contract; and to show the satisfaction of this express contract, which was part of plaintiff's testimony, and presented as such for the jury's consideration, as bearing upon the implied agreement.

p 32. fo 80.
p 77. fo 136.

XX.—The Court erred also in admitting conversations between plaintiff and defendant previous to the contract of 7th May, in not restricting the jury to a finding of one-tenth of all the services rendered if their verdict should include those services rendered after 1st January, and also is directing them to allow interest at seven per cent.

XXI.—The judgment should be reversed, for the other errors mentioned in the statement, and the points stated in the bill of exceptions.

D. D. Lord,
For Plaintiff in Error.

†

Supreme Court. 1

OF THE UNITED STATES.

GEORGE J. FOSTER,
Defendant in Error,
ads. No. 181. 2
WILLIAM W. GODDARD,
Plaintiff in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This was an action of assumpsit for services rendered by the plaintiff (defendant in error) to the defendant in and about a certain voyage, called the third voyage of the Harriet Erving, from Boston to Valparaiso, on the west coast 3 of South America, and back to Boston, in the years 1850 and 1851.

The suit was commenced in the Court of Common Pleas for the City and County of New York, August 14, 1862, and removed by the defendant to the Circuit Court of the United States.

The first count of the declaration is on a special agreement to pay one-fourth of the profits of the outward and homeward voyages, being $23,600.44, with interest from March 1, 1858. (Record, p. 34.) The second count is on 4 a promise to pay a reasonable compensation. (Record, pp. 5, 6.) The third count is upon a promise to pay a reasonable compensation for services to January 1, 1851. (Record, pp. 6, 7.) The fourth and fifth counts are the common counts of *indebitatus assumpsit* and *quantum meruit*. The damages are laid at $50,000. (Record, p. 8.)

The plea was the general issue with notice of defences.

5 1. A former recovery by the same plaintiff against the same defendant in a suit in equity in the Circuit Court for the District of Massachusetts, brought for an account under a certain agreement between the parties, dated May 7, 1849, and that the defendant's services, if any, now sued for, were rendered under that agreement. (Record, p. 9.)

2. The statute of limitations. (Record, p. 9.)

Upon the trial before the Court and a jury, a verdict 6 was rendered for the plaintiff for $29,407.70. Defendant's exceptions were allowed to the admission and exclusion of evidence, and to parts of the Judge's charge, and to his refusals to charge.

The following facts appeared: The defendant (plaintiff in error) ever since 1841 has been a merchant resident at Boston and a citizen of Massachusetts, (Record, p. 22). The plaintiff at the time this suit was brought was and ever since 1838 had been a citizen of and resident in the State of New York. (Record, p. 23.)

7 In 1840 and 1841 defendant employed the plaintiff to go to the west coast of South America as supercargo upon two successive voyages. (Record, p. 22.)

In June, 1843, the plaintiff and defendant entered into an agreement in writing, under seal, by which the plaintiff agreed to go to the west coast of South America, and there reside as defendant's agent for five years, selling the outward cargoes, purchasing return cargoes, collecting and forwarding information, and attending to the business and dispatch of the defendant's ships, giving his whole time to the business, in consideration of one-tenth of the net profits 8 of the business at the end of the term, or one thousand dollars per annum, if the one-tenth of the profits amounted to less than that sum. (Record, pp. 11, 12.)

The plaintiff, under this agreement, went to the west coast of South America, and there resided during the five

years, performing his part of the agreement, and at its expiration in 1848 returned to Boston, where the parties made a new agreement in writing and under seal, dated May 7, 1849, by which the plaintiff agreed to return to the 9
west coast upon a similar employment, giving his whole time to the defendant's business, in consideration of "one-quarter of the net profits of defendant's business in that trade that he (said Foster) shall have conducted to completion," to be paid to him on his return. This agreement provided that Foster was to leave in defendant's hands his share of the profits under the former agreement—that the plaintiff (Foster) might withdraw from this arrangement, "which he is at liberty to do at any time, by giving said Goddard so much notice that any voyage he may have 10
commenced previous to receipt of such advice, shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise." It also provided that the defendant might "annul the agreement whenever he may choose to do so," and that Foster should be liable "to the full extent of his interest and means for all losses in the business, and for all risks and casualties attendant thereon." (Record, pp. 12, 13, 23.)

Foster, under this agreement, returned to the coast, and continued to transact the business required of him (Record, 11
p. 23), and on the 22d February, 1850, wrote to Goddard that he had concluded to join the house of Alsop & Co. on the 1st of January, 1851. In this letter he said, "I will manage your business as usual until the 31st of December, which will afford you ample time to make your arrangements for sending some one out, if you be inclined." (Record, p. 14.)

On the 13th April, 1850, Goddard replied, "I am very glad to learn your decision to join the house, it being what I would have advised for your own interest." (Record, 12
p. 14.) Goddard's reply was received by Foster, May 29, 1850. (Record, p. 15.)

After sending this letter, Goddard loaded and dispatched from Boston the ship Harriet Erving upon her third voyage.

She left Boston on the 21st of August, arrived at Valparaiso on the 8th of December, and sailed thence Dec. 27, for points on the coast, to complete her cargo, and thence 13 to Boston. (Record, p. 15, 16, 17.)

From the inception of this voyage, Goddard advised Foster by letter of his intentions in relation to her outward and return cargoes, and instructed him fully as to what he, Foster, should do on the coast in relation to the same. (Letters of Goddard, May 11, Record, p. 14; July 30, p. 15; Aug. 20, p. 15; Aug. 31, pp. 16, 27; Sept. 9, p. 16; Oct. 11, p. 16; May 31, 1850, p. 27.)

The cargo was consigned to Foster, "or, in his absence, to Alsop & Co." (Bill of Lading, Record, p. 18.)

14 When the ship sailed from Boston, Goddard instructed the captain by letter as follows: "I wish you to proceed in her with all possible dispatch direct to Valparaiso, where my agent, Mr. George J. Foster, or, in his absence, Messrs. Alsop & Co., will dispose of your outward cargo, provide for the wants, and direct your further movements." (Letter of Goddard to Capt. Spavin, Record, p. 15.)

Foster concluded the whole business of this voyage in the same manner in which he had done that of previous voyages, prepared and forwarded to Goddard a note or 15 memorandum of cargo suitable to be sent to the coast, purchased and had in readiness for the ship her return cargo, and dispatched her from the coast, directed the sale of her outward cargo, and was in constant communication with Goddard in relation thereto. (Record, p. 24; Letters of Foster, p. 27; Letters of Foster, Dec. 25, p. 16; Dec. 27, p. 16; Foster to Spavin, Dec. 27, p. 17; Foster to Goddard, Jan. 3, 1851, p. 17; Jan. 25, p. 17; Feb. 25, 1851, p. 26.)

He joined the house of Alsop & Co. on the 1st of January, 1851. At that time there had been sold of the out-16 ward cargo $96,000, and there was afterwards sold $150,000. (Record, pp. 24, 19, 20.) The entire service had been performed, so far as the homeward cargo was concerned, and nine-tenths of his whole services in relation to the voyage had been performed. (Record, p. 24.)

After joining the house of Alsop & Co., he completed the business of the voyage by directing, as before, the sale of the remainder of the cargo. (Record, p. 25.) This was done with the knowledge of and without objection on the 17 part of the other partners in the house of Alsop & Co. (Record, p. 30.)

After joining the house, he sent a part of the cargo to other points on the coast for a better market, in the exercise of his discretion as Goddard's agent, as he had done with previous cargoes, which Alsop & Co. never did for any of their correspondents, unless expressly authorized. (Record, p. 25.) The sales between January 1 and June 30, at Valparaiso, and Lima, amounted to $135,000, and the remainder, about $15,000, was sold during the years 18 1851, 1852, and 1853. (Accounts Sales, Record, pp 19, 20.)

The sales of the outward cargoes, and the purchases of the homeward cargoes, were made by Alsop & Co., who advanced the necessary funds, and charged and received a commission therefor. (Record, pp. 23, 24.)

Foster advised Goddard, by private letter of Feb. 25, 1851, of the sales he was making of the outward cargo, and that he should work off part of the goods "through Callao," the port of Lima. (Record, p. 26.) 19

Alsop & Co. rendered accounts of the sales at Valparaiso and Lima to Goddard. (Record, pp. 19, 20, 21.)

In November, 1851, Mr. Shirley Erving arrived on the coast to act as Goddard's agent in the same business, in subsequent voyages. He took no part in the unfinished business of this voyage. (Record, pp. 25, 26.)

Foster returned to the United States in 1856, when Goddard expressed himself perfectly satisfied with everything he had done in his business. (Record, p. 26.)

May 1, 1857, Foster filed his bill in equity against God- 20 dard, in the Circuit Court of the U. S. for the District of Massachusetts, for an account and to recover his share of the profits under the two agreements of 1843 and 1849. (Record, p. 32.) Goddard having appeared and answered,

a decree for an account was entered, and an account was
taken before a master. Upon that accounting the plaintiff
claimed to recover under the agreement of May 7, 1849, a
21 quarter of the profits of the third voyage of the Harriet
Erving, on the ground that by a subsequent agreement of
the parties, shown by their correspondence, it was to be considered as included in that agreement, and that it was substantially brought to a completion before January 1, 1851.
The master so decided, and reported as due to Foster for
his share in the profits of this voyage, $21,943.15.
(Master's Report, Record, pp. 58, 63, 69.) Upon exceptions
to the Master's report, the Circuit Judge disallowed this
item, holding that this voyage of the Harriet Erving was
22 not covered by the agreement between the parties of May
7, 1849, and upon appeal this Court affirmed (and upon
the same ground), the final decree, whereby this item was
disallowed in that suit. The defendant below has satisfied
the final decree in that suit.

The Court also denied the plaintiff's motion to amend his bill, stating an extension of the agreement of May 7, 1849, by subsequent agreement of the parties so as to include this voyage. (Record, pp. 74, 75.)

The opinion of the Master will be found in the record,
23 p. 58, 63.

The opinion of the Circuit Court is reported, 1 Clifford, 158.

The opinion of this Court is reported, 1 Black, 506.

The questions raised by the Bill of Exceptions, for review upon this writ of error, are as follows:

Upon the trial of the cause the defendant offered in evidence the record in the equity suit as a bar to this suit. The evidence was excluded and defendant excepted. (Record, pp. 32, 76.)

24 The record was also offered in evidence in bar of all claim in this suit for services rendered before January 1, 1851. The evidence was excluded and defendant excepted. (Record, p. 77.)

The plaintiff offered evidence of the value of his serv-

ices. The defendant objected on the ground that the serv-
ices of the plaintiff, if any, rendered in this voyage were
rendered under the agreement of May 7, 1849. But the
Court ruled that the services shown were outside of that 25
agreement and admitted the evidence, to which the de-
fendant excepted. (Record, pp. 26, 31.)

The Court ruled and so instructed the jury "that there
was an agreement between the parties for the performance
by Mr. Foster of such services as he rendered in respect of
the third voyage of the Harriet Erving to be compensated
for at such rates as those services reasonably deserved," and
that the plaintiff was entitled to recover upon a *quantum
meruit* the value of his services, and refused to direct a
verdict for the defendant, the defendant claiming that the 26
plaintiff's services rendered in this voyage were rendered
under the agreement of May 7, 1849. To this ruling and
refusal to rule the defendant excepted. (Record, pp. 78, 79,
80, 81, 82, 83.)

The plaintiff offered evidence tending to show that after
joining the house of Alsop & Co. he continued to perform
the business of this voyage as before, to its completion.
Defendant objected to the evidence as incompetent in view
of the agreement of May 7, 1849. But the court admitted
the evidence, and defendant excepted. (Record, p. 25.) 27
And plaintiff was allowed, under exception of defendant, to
introduce evidence that by his direction and discretion,
after joining the house, a part of the cargo was trans-shipped
to Lima for sale there, and that, in the regular course of
business, Alsop & Co. would not have done so. He was
also allowed to show, under defendant's exception, that one
of the accounts of sale of this cargo, by mistake of a clerk,
was headed "Sales by order of Sherley Erving," and that
Mr. Erving had nothing to do with it. (Record, p. 25.)

The court refused to charge the jury that there was no 28
evidence of the employment of the plaintiff after January
1, 1851, except as a member of the firm of Alsop & Co.,
and that the plaintiff could not recover for his services after
that time. To this ruling the defendant excepted. (Rec-
ord, p. 80.)

The court ruled and instructed the jury, that th plaintiff could not recover under the first count of the declaration, nor any part of the profits of the voyage. (Record, p. 83.) 29

The court instructed the jury that the plaintiff was entitled to a reasonable compensation, with interest thereon, from the commencement of the suit, at seven per cent. To this instruction, as to interest, defendant excepted. (Record, p. 82.)

The court instructed the jury, that in fixing the reasonable compensation to which the plaintiff was entitled, they must take into consideration the whole evidence in regard to the worth of the services, the testimony of the witnesses 30 as to their value, and the rates of compensation fixed by the former agreements between the parties; but in looking at these rates fixed in the previous relations of the parties, they must consider precisely what those relations were, and must take into consideration the fact that, under those agreements, the compensation was based on the risk and responsibility on the part of Foster, and all the other circumstances which led to the fixing those rates as a measuring not merely of the value of Foster's services, but of the estimation in which Mr. Goddard held him as agent. 31 To these instructions the defendant excepted. (Record, pp. 82, 83.)

The plaintiff introduced evidence tending to show that his services were worth 5 per cent. on the net proceeds of the outward and homeward cargoes. (Record, pp. 26, 31.)

The defendant being called as a witness, testified that the plaintiff's services were worth $4,000 per annum, and he also testified that after the termination of Foster's agency, he sent out his brother-in-law, Shirley Erving, to act as his agent, and he offered to show that he paid him 32 $4,000 per annum, and that he was equally competent with Mr. Foster. The court excluded the evidence, and defendant excepted. (Record, p. 77.)

In the examination of Goddard, he was asked whether he had any reason to suspect the competency of Mr. Riley, one of the firm of Alsop & Co., or of that firm, to manage his consignments. The plaintiff objected, and the court excluded the evidence, to which the defendant excepted. (Record, p. 77.) 33

The plaintiff offered evidence tending to show that before the plaintiff returned to the coast, in 1849, Goddard told him that he did not see any reason why he could not join Alsop & Co., and still carry on previous relations with him. Defendant objected on the ground that as the matter is covered by the agreement of May 7, 1849, the agreement could not be varied by the previous permission of Goddard that he should assume the duties of a member of that house. The court admitted the evidence, and defendant excepted. (Record, p. 23.) 34

The court admitted, under defendant's exception, a letter from Goddard to Capt. Spavin, dated Aug. 21, 1850, in which he names Foster as his agent; also a letter of instructions from Foster to Capt. Spavin, on dispatching the ship, Dec. 27, 1850. (Record, pp. 15, 17.)

POINTS AND AUTHORITIES.

FIRST POINT. 35

THE JUDGMENT IN THE FORMER SUIT BETWEEN THE PARTIES IS NOT A BAR TO THIS ACTION.

The vital question on this point is whether upon the true construction of the agreement of May 7, 1849, the plaintiff was required to perform the services performed by him in relation to the third voyage of the Harriet Erving, *under that agreement.*

If this is not the true construction of that agreement
and it did not require him to render the service in this
voyage, then the judgment is no bar, because in that case 36
the service rendered and for which compensation was
sought in this action, was not rendered under the agreement on which that suit was brought, and the causes of action in the two suits are wholly distinct.

The former action was on a sealed instrument and the plaintiff had his election of an action at law *in covenant*, or a suit in equity for an account to which the agreement
37 entitled him.

This action is assumpsit upon a simple contract on a subsequent agreement not under seal or an implied promise, based on services rendered by the plaintiff at the request of the defendant. An action of *covenant* would not lie on such a contract, and as there is no agreement for an accounting or a share of the profits, a bill in equity could not be maintained.

This cause of action, therefore, could not have been joined with an action in any form on the agreement of May
38 7, 1849. But it is enough to say that it need not be joined, being a distinct cause of action of a different nature.

Now, on this question of the proper construction of the agreement of May 7, 1849, we have to look: 1st, to the agreement itself; and, 2dly, to the judicial opinions in relation to its construction, delivered in the course of the former suit.

1. The agreement of May 7, 1849, very clearly by its own terms, does not require Foster to render any service in any voyage to be commenced after the receipt by Goddard
39 of Foster's notice of withdrawal.

The stipulation in regard to the mode and effect of such notice by Foster is wholly inconsistent with any other intention.

The language is, "It is understood that said Foster is to leave in hands of said Goddard, bearing interest, whatever funds he may have less two thousand dollars, &c., and that neither the said, nor any portion of his profits, shall be abstracted until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any
40 time, by giving said Goddard so much notice that any voyage he may have commenced previous to receipt of such advice, shall receive the full benefit of all said Foster's services to its final accomplishment." (Record, p. 13.)

Now, the plain meaning of this stipulation, considered by itself, is, that after the receipt of the notice, Foster was

required only to complete the business of voyages already commenced. This is clearly the purpose the parties had in naming a future day for the termination of their relations under the agreement. And on turning to other parts of 41
the agreement, this view is confirmed. The agreement provides that Foster's compensation shall be one-fourth part of the net profits of his (Goddard's) business in that trade, that he (said Foster) shall have conducted to completion.

Taking these two provisions of the agreement together, there can be no mistaking the intent of the parties. Foster was allowed to withdraw at any time on notice, subject only to this reasonable and necessary limitation, that as he is to be compensated by a share in the profits of voyages, 42
his notice shall be such that he shall remain long enough to complete the business of those voyages in which he is to be interested.

It is an agreement relating to *complete voyages*, both as to service and compensation, and not to fragments of voyages.

Again, the agreement provides that "Foster is liable to the full extent of his interest and means for all the losses that may be made in this business, as also for all the risks and casualties attendant thereon." 43

This stipulation also indicates the same intent of the parties, and is inconsistent with any other construction. The losses he is to share and the risks he is to assume are the losses and risks in "this business;" that is, all the business he is required to do and is to do under the contract. How could losses be computed or predicated of fragments of voyages? There can neither be profits nor losses except upon the final result of the adventure, and the only unit in the business is the "voyage." This language is therefore meaningless, except as applied to completed voyages. 44

This construction also is alone consistent with the general scope and purpose of the contract itself, and with fair dealing between the parties.

The agreement is framed on the theory, no doubt just, that the greatest fidelity and efficiency in the agent is se-

cured by giving him a liberal share in the profits of the business he conducts, and subjecting him to share in the losses to which his negligence or inefficiency may lead.
45 This purpose marks the whole agreement. And yet, if the construction now claimed on the part of Goddard is adopted, the result is that he fails entirely to receive the benefit of this great security for his agent's diligence and fidelity as to a large part of the business to be conducted under the agreement. While as to the complete voyages Foster has every inducement to conduct the business with the utmost skill and diligence, as to the voyage commenced after his notice of withdrawal, Goddard's interests were left wholly unprotected by any of the ordinary inducements to secure
46 the agent's fidelity.

It may be confidently claimed, therefore, that Goddard did not in this instance intend an arrangement which is not only not consistent with the theory of prudent mercantile business, on which his agreements are carefully framed, but which in so large and critical adventures, involving in each voyage many hundreds of thousands of dollars, no prudent merchant would for a moment tolerate.

It may also be fairly urged in support of the construction of the agreement now contended for, that it has the
47 merit of making the compensation stipulated for commensurate with the service to be rendered, whereas the other construction leads to this improbable and absurd result that, while the number of voyages which Foster was to share in the profits of was fixed, the number of voyages he was to conduct was left wholly uncertain. Foster was to do a great deal of work in which he had no interest. The amount of which is dependent wholly on Goddard's own will—a very unequal, unusual, unmercantile transaction.

The general terms of the stipulation in the earlier part
48 of the agreement must be construed in view of and in connection with all the other parts of the agreement, to which reference has been made, and there is no inconsistency between them.

Foster's promise to give "his whole time" to the business is to be limited to the period of his full employment, that is, prior to the receipt of notice of withdrawal.

After that notice his undertaking to finish up voyages commenced, of course requires him to give to them so 49 much of his time as shall be necessary for that purpose, and would prevent his making any other business engagement inconsistent with this requirement.

It is obvious that the expression "*business*" in this agreement means the business of voyages, and that only. This is indicated not only in the provision relating to losses and risks in the business already adverted to, but elsewhere. Thus "his business in that trade that he (said Foster) shall have conducted to completion," refers to voyages. So, also, the stipulation as to the mode of computing the 50 profits "after deducting interest on the capital furnished, &c., as also all costs and expenses, &c., both at home and abroad, in prosecuting *the business*, including *the sailing and keeping in repair the vessels* employed, &c. And "said Goddard has the right of purchasing, &c., the *vessels designed for the trade* at his option, &c." The vessels now designed for the trade are the ships Crusader and Harriet Erving, &c. 51

It will be observed that the two clauses containing the expressions "business in that trade that he shall have conducted to completion," and the expression "so much notice that any *voyage* he may have commenced shall receive the full benefit, &c., to its final accomplishment," are clearly related clauses, and show the identity in this agreement within the understanding of the parties, of the words "voyage," and "business."

It cannot be claimed, therefore, that the word "*business*," in the general terms of the first clause of the agreement, has any larger or different meaning.

2. This construction, deduced from the terms of the 52 agreement itself, has received judicial approval at all stages of this controversy.

In the former suit the plaintiff claimed, that though he was not required by the terms of the agreement to render

any services on a voyage commenced after receipt of his notice of withdrawal, yet that the correspondence of the parties showed that the parties had subsequently agreed
53 that this voyage should be considered as conducted under the contract. The master adopted this view, and uses this language in relation to the precise point of construction in question: "Let it be observed that, under the agreement of 1849 then subsisting, Foster could be called upon to transact no business of which he was not to share the profits." (Record, p. 63.)

The master having held that by a subsequent agreement between the parties, this voyage was within the agreement of 1849, the defendant filed the following objec-
54 tion to the draft of his report: "8th Objection. For that the said master hath in and by the draft of his said report, credited to the complainant, under the contract dated May 7th, 1849, the sum of $23,600 47, as profits made by the respondent from the outward and return cargo of a ship called the Harriet Erving, during her third voyage from Boston to Valparaiso, and from Valparaiso to Boston, which vessel during the said voyage was owned by the respondent, and performed the voyage aforesaid at his cost, risk, and profit exclusively, and not within or under the
55 contract aforesaid, &c." (Record, p. 72.)

So also the respondent's 10th exception to the master's report contains the following: "which vessel (the Harriet Erving) and cargoes and the profits resulting therefrom during the said voyage were not embraced in the contract of May 7, 1849, &c." (Record, p. 71.)

Mr. Justice Clifford, overruling the master on the point that, by a subsequent agreement, the parties agreed to consider this voyage within the contract, a conclusion which he thought not warranted by the evidence, very emphati-
56 cally declared his opinion on the construction of the agreement on the point now under consideration. He says: "At the time the vessel sailed on her outward voyage, both parties understood that the complainant (Foster) had complied with the terms of the agreement in giving the notice,

and that he was under no obligation arising out of its terms and conditions to transact this business." (1 Clifford, p. 184.)

The further objection having been taken and sustained by the court, that the bill did not contain a sufficient aver- 57
ment of this subsequent agreement extending the contract so as to include this voyage, the complainant applied to amend his bill, but Mr. Justice Clifford denied the motion. (Record, pp. 74, 75.) If the evidence had warranted the master's conclusion on this point, the amendment would have been a matter of course, conforming the pleadings to the proofs. The only ground, therefore, on which the motion to amend was denied, can be that the court was fully satisfied that the evidence in the case did not warrant the conclusion that, by a subsequent agreement, this voyage 58
was brought within the agreement. And so Mr. Justice Clifford distinctly says: "After a careful examination of all the correspondence, I am of the opinion that it does not sustain that view of the case. On the contrary, it appears to me that both parties well understood that their relations, *under the written agreement*, so far as respects this voyage, had ceased. For these reasons the 10th exception is sustained." (1 Clifford, p. 185.)

The opinion of this court (1 Black, 506) affirming the decree of the circuit court, necessarily decides that Foster 59
was not required to render these services under the contract, for the court held as to this voyage, that "it is not within the contract."

The same alternative was presented to the court in that case as in this, that either Foster was required to render this service in consideration of the stipulated compensation of a share in the profits of other voyages, or else that this voyage was "not within the contract." They did not adopt the former construction. They expressly approve the latter, and remitted the plaintiff to his action to recover 60
for these services on a *quantum meruit*.

There has been an entire concurrence, therefore, thus far at every stage of this controversy, in the former suit as well as in this, that the contract did not require this service of the plaintiff, and that this voyage was not within the contract.

And the sum of the whole matter is, that the defendant 61 below, having defeated the claim for the Erving's third voyage in the former action, by convincing the court at every stage of the cause that this voyage was *not* within the contract, now seeks to defeat this action by satisfying the court it was in error, and that this voyage *was* after all within the contract—a position which nothing can reconcile with a sense of justice, and which the former judgment concludes the defendant below from maintaining in this suit.

62

SECOND POINT.

THE COURT PROPERLY CHARGED THE JURY THAT PLAINTIFF WAS "ENTITLED TO RECOVER THE REASONABLE QUANTUM MERUIT VALUE OF HIS SERVICES" (Record, p. 82, fol. 150); THAT THERE WAS AN AGREEMENT BETWEEN THE PARTIES FOR THE RENDERING OF SOME SERVICE "DISTINCT AND INDEPENDENT FROM THAT OF MAY 7, 1849;" THAT "THAT AGREEMENT AS MATTER OF LAW, AS ONE 63 DRAWN FROM CORRESPONDENCE BETWEEN THE PARTIES, THE JURY WERE BOUND TO FIND;" AND "THAT THERE WAS AN AGREEMENT BETWEEN THE PARTIES FOR THE PERFORMANCE, BY MR. FOSTER, OF SUCH SERVICES AS HE RENDERED IN RESPECT OF THE THIRD VOYAGE OF THE HARRIET ERVING, TO BE COMPENSATED FOR AT SUCH RATES AS THESE SERVICES REASONABLY DESERVED." (Record, p. 83, fol. 154.)

No question is made that up to the first of January, 1851, the plaintiff did render service to the defendant in re- 64 gard to this voyage, of a character similar to that rendered by him in relation to previous voyages. The question whether his service extended beyond that time and the nature and value of it after that time, are not material to this point, and are hereinafter discussed.

That this service was exceedingly valuable the verdict is sufficient proof.

The simple question is whether for that service thus rendered the defendant is bound by law to make compensa- 65
tion.

Upon the settled construction of the agreement of May 7, 1849, as expounded by the former decision of this court, the plaintiff was not bound to render these services in regard to this voyage under that agreement.

The plaintiff's notice of withdrawal was contained in his letter of Feb. 22, 1850, in these words: "After a great deal of reflection on the subject, I have concluded to join the house of Alsop & Co. on the 1st of January, 1851. I will manage your business as usual, until the 31st of 66
December, which will afford you ample time to make your arrangements for sending some one out, if you be inclined. I advise your having an agent on the coast, as frequent suggestions can be made, of which he can take advantage, when a member of a house cannot take any general responsibility. If, however, you should send no one, your instructions should be discretionary. Most constituents send positive orders, and in this respect you have always held an advantage. I shall always take great interest in your affairs, and you may depend upon my assisting 67
any agent you may have here, to the utmost of my ability." (Record, p. 14.)

The defendant received this letter, and in his reply of April 13, 1850, he says: "I am very glad to learn your decision to join the house, it being what I would have advised for your own interest." (Record, p. 14.)

This court, upon full deliberation, has decided that this was a notice of withdrawal on the part of Foster, and a fixing of a time within which, in the language of the agreement, "any voyage he (Goddard) may have com- 68
menced previous to the receipt of such advice shall receive the full benefit of all said Foster's services to its final accomplishment;" and that Goddard's reply was an acquiescence on his part in the sufficiency of the time fixed for that purpose.

The state of things on the receipt by Goddard of Foster's letter of Feb. 22, 1850, was this:

There were two vessels employed in the trade, the Crusader and the Harriet Erving. The Crusader had sailed from Boston on the 27th of February. (Letter Goddard to Foster, Feb. 27, Record, p. 14.) The Erving was about due in Boston, on her return from her last voyage (Letter Goddard to Foster, March 29, 1850, Record, p. 14), although she did not arrive till the 29th of May. (Letter Goddard to Foster, May 31, 1850, Record, p. 27, fol. 66.) 69

When Foster received Goddard's letter of April 13—which he did on or before the 29th of May—there were still on hand on the coast, undisposed of, the remainders of half a dozen outward cargoes. (Record, p. 23, fol. 56.) 70

The Crusader, which was on her way to the coast when Goddard received the notice of Foster's withdrawal, left the coast on her return to Boston on the 10th of June. (Record, p. 23, fol. 56.)

After the sailing of the Crusader, on the 10th of June, all that remained for Foster to do, as regards voyages commenced before April, 1850, was the disposition of the Crusader's cargo and the remainders of previous outward cargoes. (Record, p. 23, fol. 56.)

71 The Erving did not leave Boston, on her third voyage, till the 21st of August, 1850, more than four months after Goddard's receipt of Foster's notice of withdrawal. (Letter, Goddard to Foster, Aug. 20, 1850, Record, p. 15.)

There is no pretense, therefore, nor is it contended that the third voyage of the Harriet Erving had been commenced at the time of the receipt of that notice.

Foster, then, being under no obligation whatever to assume the conduct or management under the agreement of May 7, 1849, of any voyage after that of the Crusader, 72 then already commenced, offers in this letter communicating his notice of withdrawal, his further service to Goddard in these words: "I will manage your business as usual until the 31st of December, which will afford you ample time to make your arrangements for sending some one out, if you be inclined."

As to the voyages then commenced, the suggestion as to a new agent is wholly meaningless. It was in the contemplation of both parties, according to the terms of the contract, that these unfinished voyages could and would be 73
completed by Foster by December 31st.

The purport and pertinency of this proposition plainly are on Foster's part, and, plainly, on Goddard's part, were understood to be, "That in the interval before the arrival of any new agent to represent you, I will perform the same services for the new voyages not covered by the contract of **May 7, 1849,** that I have rendered in the voyages covered by the contract, and that your new agent would perform were he here."

Goddard immediately availed himself of Foster's pro- 74
position to perform the service of agent, in respect of a new voyage, and before a new agent should arrive. He delayed sending out a new agent, and loaded and dispatched the Erving to the coast, and the further correspondence shows conclusively that she was dispatched and sent out to Foster, as Goddard's agent, under and in pursuance of this offer by Foster, to act in relation to further voyages in that capacity.

May 11, he wrote, "The Erving is a very sharp ship.
I do not make this statement because I want the Erving 75
and Crusader loaded to 22 feet, for you know I prefer to have our vessels in trim to make good passages." (Record, p. 14.)

July 30, 1850, he advises Foster that she will sail in 15 or 20 days. (Record, p. 15.)

Aug. 19, his letter of instructions to the captain of the Erving distinctly names Foster as *his agent* in the matter of this voyage. The direction to the captain to report to Alsop & Co., in the absence of Foster, was but a proper
precaution to provide for the possible contingency of Fos- 76
ter's death, or temporary absence. (Record, p. 15.)

To the same effect is the bill of lading of the cargo, naming Foster as the consignee. (Record, p. 18.)

His letter to Foster, of May 31, advises of the arrival of the Erving in Boston, and of the goods secured for her on this voyage. (Record, p. 27, fol. 66.)

His letter to Foster, of Aug. 20, on dispatching the
77 ship, contains instructions as to the disposition and management of the cargo. And the same is true of his letter to Foster of Aug. 31. (Record, p. 27, fols. 67, 68.) These two letters would alone be sufficient to determine the relation between the parties as to this voyage as that of principal and agent, employer and employee.

Foster's letters to Goddard fully confirm this view of their relation, as understood by both of them.

April 29, Foster advises the sending of tobacco by the Erving. (Record, p. 27.)

78 May 11, he encloses a note of cargo to be sent out by her from Boston. (Record, p. 27.) The cargo sent out corresponded very nearly with this note. (Letter Goddard to Foster, July 30. Record, p. 15.) (Foster's testimony, Record, p. 26, fol. 65.)

May 29, Foster gives further advice as to outward cargo. (Record, p. 27.)

September 25, he advises of what the homeward cargo will consist. (Record, p. 27.)

And the letters of October 25, November 5, 19, and 25,
79 are also just such letters as an agent writes to his principal, and are obviously inconsistent with any other relation between the parties.

Foster's letter to Capt. Spavin, of December 27, when he despatched the ship, is a letter of instructions as to the captain's conduct of the voyage, and is conclusive of the same purpose and intent. (Record, p. 17, fol. 40.)

This correspondence fully justifies the instruction that there was an agreement between the parties under which these services were to be paid for. As this appears upon
80 the face of the correspondence and upon the admitted acts of the parties, there was no occasion to submit the question to the jury. It was a question for the Court. There was no dispute as to the facts.

It seems not to be insisted now that there is any evi-

dence that the services of the plaintiff in relation to the voyage were rendered gratuitously and as a personal favor to Goddard. At any rate any such claim is clearly inconsistent with the intention of both parties, as shown on the 81
correspondence, and also with the very nature and magnitude of the transactions.

It results, therefore, that this service, not being rendered under the agreement of May 7, 1849, and not being rendered gratuitously, but as a matter of business, in the absence of any express promise as to the rate of compensation, the plaintiff, by the familiar rule of law, is entitled to a reasonable compensation, and the instructions of the court on this point were correct.

82

THIRD POINT.

THE QUESTION WHETHER THERE WAS AN AGREEMENT BETWEEN THE PARTIES, SHOWN BY THE CORRESPONDENCE, FOR THE RENDERING OF THE SERVICES IN QUESTION, DISTINCT AND INDEPENDENT OF THE AGREEMENT OF MAY 7, WAS A QUESTION OF LAW TO BE DETERMINED BY THE COURT, AND NOT A QUESTION FOR THE JURY. 83

The rule of law that the interpretation of written instruments is a question of law for the court, is applied with full force to agreements to be deduced from the correspondence of the parties, and the fact that the language of the letters containing the offer or acceptance is doubtful, does not relieve the court of this duty, or make the question one of fact for the jury. It is only where terms used are technical, or terms having a peculiar meaning in a particular trade or place, that the aid of the jury is in- 84
voked to ascertain their meaning.

In Hutchinson v. Bowker, 5 M. & W. 535, where the question was, whether there was a contract between two parties, to be deduced from correspondence, the question being whether the proposal by the letter of one party was

accepted by the reply of the other. Parke B. said, "The law I take to be this: that it is the duty of the court to construe all written instruments; if there are peculiar ex-
85 pressions used in it, which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word "fine" in the corn market; and the jury having found what that was, the question whether there was a complete acceptance by the written documents, is a question for the judge."

86 In Morrill v. Frith, 3 M. & W. 402, it was held, overruling Lloyd v. Maund, 2 T. R. 760, that the construction of an ambiguous letter of the defendant, relied on as an acknowledgment to take a debt out of the statute of limitations, was for the court and not for the jury.

In Begg v. Forbes, 30 Eng. L. & Eq. Rep. 508, the question whether a contract was made between the parties by a long correspondence, was held to be a question for the court exclusively. Jervis, Ch. J., said, "Surely the construction of written documents is for the judge, whether
87 many or few in number."

It is only where the contract rests partly in the correspondence and partly in *oral communications* that the question whether there is a contract, is a question for the jury. Bolckow v. Seymour, 17 C. B. (N. S.) 107.

In the construction of written documents, it is the right and duty of the Court to construe them by the aid of surrounding circumstances, admitted or proved, and especially to look at the existing relations between the parties.

88 Blossom v. Griffin, 13 N. Y. 569.
Bell v. Bruen, 1 How, 169, 183.
O'Neill v. James, 43 N. Y. 84, 92.

To apply these principles to the present case, there was here no oral communication between the parties between the letter of Foster, of February 22, containing his offer of service, and the termination of the employment in regard to the third voyage of the Harriet Erving, and so far as it depended upon communication between the parties, the 89 agreement whatever it was, was in writing, and before the Court for interpretation.

There remained only the mercantile transaction of the voyage itself, presenting no contestation as to its facts, and no diversity even in the evidence concerning them.

The disposition of the question, therefore, was properly assumed by the Court.

And if the defendant desired the presentation of any fact as disputed to the finding of the jury, he should have asked such instructions and submission to the jury respecting 90 the same, as he thought the law would justify.

O'Neill v. James, 43 N. Y. 84.

FOURTH POINT.

IN ANY VIEW OF THE INSTRUCTIONS OF THE COURT THERE WAS NO ERROR FOR WHICH THE JUDGMENT WILL BE REVERSED, BECAUSE ON THE UNDISPUTED FACTS IN THE CASE THE 91 PLAINTIFF WAS ENTITLED TO THE INSTRUCTION GIVEN, THAT HE WAS ENTITLED TO RECOVER THE REASONABLE *quantum meruit* VALUE OF HIS SERVICES.

If this instruction was right, the defendant is not injured by the further instructions in relation to the agreement being shown by the correspondence, because the verdict must necessarily have been the same, and the defendant had his exception to this ruling.

92 The plaintiff was entitled to this instruction, because on the undisputed facts in the case, the service was rendered by Foster at Goddard's request, and there was no evidence from which the jury could have found that the service was rendered gratuitously, or as a mere personal favor. The defendant's claim was not that the service was gratuitous,

but that it was rendered under the agreement of May 7, 1849. Nor did the defendant ask to have the question whether the service was gratuitous submitted to the jury,
93 nor require any instructions on that point.

FIFTH POINT.

THE COURT PROPERLY REFUSED TO INSTRUCT THE JURY "THAT THERE WAS NO SUFFICIENT EVIDENCE TO ESTABLISH ANY EMPLOYMENT OF THE PLAINTIFF BY THE DEFENDANT IN AND ABOUT THE BUSINESS OF THAT VOYAGE, AFTER THE 31ST DAY OF DECEMBER, 1850, EXCEPT AS A MEMBER OF THE
94 HOUSE OF ALSOP & CO., AND THAT FOR SERVICES RENDERED BY SUCH FIRM THE PLAINTIFF CANNOT RECOVER IN THIS ACTION." (Record, p. 80.)

The judge left it to the jury to determine the amount and value of plaintiff's services, both before and after January 1. (Record, p. 82, fol. 150.)

He instructed the jury as follows: "I instruct you, gentlemen, that Mr. Foster is entitled to recover in this case such sum as the reasonable *quantum meruit* value of
95 his services upon the evidence you may regard to be proper." "That includes a consideration by you of what his services were, the entire scope of the trade, and Mr. Foster's qualifications for those services at the time he rendered the services in reference to this third voyage of the Harriet Erving, and the consideration of how much these services were in bulk or in value before the 1st of January, 1851, and the consideration of the extent of these services after that date, and whether they are to be diminished after by any payment or allowance which ought to be charged
96 against Mr. Foster because of any compensation he may have received as a member of the firm of Alsop & Co. The whole question is one of fact for you to pass upon as men of judgment and intelligence, and upon the evidence, applying your best faculties to it."

The defendant excepted to none of these instructions, except the first, that the plaintiff was entitled to recover the reasonable *quantum meruit* value of his services. (Record, p. 82.) 97

There was uncontradicted evidence of such service after January 1, 1851.

The plaintiff testified that the remainder of the cargo was disposed of under his direction after that time, and that he trans-shipped a part of it to Lima for a better market after that time, which Alsop & Co. never did without instructions for any of their constituents, and which, under Goddard's discretionary orders to him, he had been accustomed to do on previous voyages. (Foster's testimony, Record, p. 25, fols. 59–62.) 98

On the 25th February, 1851, after Goddard knew he had joined the house, he advised Goddard that he should work off a part of the goods through Callao. This was notice to Goddard that Foster was continuing to act for him in relation to this voyage, in a manner in which according to the well-known course of dealing Alsop & Co. could not act. This same letter also, a private letter written by Foster to Goddard in relation to the business of this particular voyage, although Foster, as conducting the correspondence of the house, was at the same time in 99 communication with Goddard on behalf of the house, is evidence of notice to Goddard that Foster was still dealing with the whole unfinished business of the voyage as a matter between himself and Goddard. (Letter, Record, p. 26, fol. 64.)

The testimony of Mr. Riley, one of the resident members of Alsop & Co., in the early part of the year 1851, fully confirms the testimony of Foster as to his service after January 1, 1851; and also disposes of the objection that, in joining Alsop & Co., Foster precluded himself by 100 the articles of copartnership of that house from attending to this unfinished business, for he testifies that Foster's continuing to act as before in relation to the business of this voyage was known to, and not objected to by, the other members of the firm. (Riley's testimony, Record, p. 30.)

The strictest interpretation of articles of copartnership
101 prohibiting an interest out of the house, could hardly prevent a member who joins a firm from winding up unfinished business. As Foster testified on cross-examination, "When a man becomes a member of a house, they must take him with all his balances." Alsop & Co. acted on this principle of business, and acquiesced in Foster's finishing up this voyage after he joined the house.

Goddard, before Foster left Boston in 1849, had said to Foster, "that he did not see any reason why Foster could not join Alsop & Co., and still carry on previous relations
102 with him." (Record, p. 23.) Foster replied, "that that was very doubtful, though he did not know entirely what the rules of Alsop & Co. were on this subject." After Foster had concluded to join the house, and had seen the articles, he wrote, February 22 (Record, p. 14, p. 24, fol. 37), "by the articles of this house, no active partner can have any interest out of the establishment, and they are bound down in the most particular manner." This was obviously an answer to the question made by Goddard in Boston, whether after Foster joined the house he could not under-
103 take for the management of Goddard's future business.

In the light of the practical construction given by Alsop & Co. themselves to their articles in treating this restriction as applying only to new business, and not importing any prohibition upon the winding up of this unfinished business of the new partner, it would be indeed an over refined scruple that should preclude Foster from recovering whatever his services, after joining the house (shown to have been rendered, and to be distinct from his services as a member of the house) were worth.

104 It was also shown that though Goddard's new agent, Shirley Erving arrived on the coast in Nov. 1851, and there then still remained a part of this cargo undisposed of, he took no part in the unfinished business of this voyage. This tends to show that Goddard understood very well that

this was still Foster's affair, and instructed his new agent accordingly. (Record, pp. 25, 26, fols. 62, 63.)

Moreover, when Foster returned to New York in 1856, Goddard told him he was perfectly satisfied with all he had 105 done. (Record, p. 26, fol. 64.) Goddard might well be presumed, even if there were no evidence of notice to him to have known what Foster had done. He professed to know for he approved it all.

Goddard also was a witness on the trial, and has nothing to say on this point.

Upon this state of the testimony, it cannot be contended that there was no evidence of service and employment after January 1, 1851, and the instruction asked for was properly refused, the actual instructions given being completely 106 protective of the defendant's rights in this regard, and so far as this point is concerned, being acquiesced in by not being excepted to.

SIXTH POINT.

THE COURT PROPERLY INSTRUCTED THE JURY THAT THE PLAINTIFF WAS ENTITLED TO INTEREST AT THE NEW YORK RATE OF 7 PER CENT. PER ANNUM. 107

Where interest is allowed not under contract, but by way of damages, the rate must be according to the *lex fori*.

There is no rule or law establishing any other rate in the courts of the United States.

SEVENTH POINT.

108 THERE WAS NO ERROR IN REFUSING TO GIVE THE 9TH AND 10TH INSTRUCTIONS ASKED FOR BY DEFENDANT. (Record, p. 81.)

The court ruled as defendant requested, that the

plaintiff could not recover under the first count, nor any part of the profits of the third voyage of the Harriet Erving. (Record, p. 80, 2d, 3d and 8th rulings.) The 9th and 10th
109 requests to instruct the jury related wholly to the first count, and after the instructions already given had no relation to the case.

EIGHTH POINT.

The question of the rate of compensation to be allowed was fairly left to the jury.

110 The jury were properly cautioned against giving too great effect to the rates of compensation stipulated for in the two written agreements. Those two agreements were a part of the history of the transaction. They were read in evidence without objection. (Record, pp. 12, 13.) As dealings between the same parties they were important evidence, as showing the value defendant himself put on plaintiff's services.

111

NINTH POINT.

There was no error in the admission or exclusion of evidence.

I. The letter from Goddard to Capt. Spavin was properly admitted. (Record, p. 15, fol. 37.) Its bearing on the question of the relation in which the parties stood in respect to this voyage is too obvious to require argument.

II. The letter from Foster to Capt. Spavin was also
112 properly admitted. (Record, p. 17, fol. 40.)

It was substantive proof in itself of an act of service on Foster's part.

III.—The deposition of Stevens was not objected to as inadmissible, and the exception, in relation to it, only covers the refusal of the Court at that particular stage of the trial to rule that it was admissible only under the first count. (Record, p. 21, fol. 30.)

There was no occasion for giving any instructions as to the application of this evidence at that stage of the case. 113

This deposition merely proved the amount of the profits of the third voyage of the Harriet Erving. (Record, pp. 21, 22.)

When the testimony was all in, the Court ruled and instructed the jury, upon defendant's request, that the plaintiff could not recover under the first count, "that the plaintiff is not entitled to recover any portion of the profits made or realized by means of the third voyage of the Harriet Erving," and "that in estimating the value of the services of the plaintiff, the jury must entirely disregard the proof of profits made by the defendant from the third voyage of the Harriet Erving." (Record, p. 80.) 114

Thus the Court made all the application of this evidence which the defendant requested, at the proper time.

IV.—There was no error in the admission of the conversation between Goddard and Foster at Boston, before Foster left for the coast in 1849. (Record, p. 23, fol. 54.)

This conversation explains and gives meaning to the remarks in Foster's letter of February 22 (Record, p. 14) as to the restrictions contained in the articles of the house of Alsop & Co. That letter, as shown above, answers the question proposed by Goddard in that conversation. 115

The objection that this was evidence tending to vary the written agreement of May 7, 1849, is wholly untenable.

It was not offered to vary, nor did it tend to vary or affect in any way, the written agreement of May 7, 1849, as the objection assumes.

V. The objection to proof of what ship was in February expected to arrive next at Valparaiso, is untenable. (Record, p. 24.) The plaintiff had a right to lay before the court and jury the precise position in which the business stood when he gave his notice of withdrawal. 116

VI. The evidence of acts of the plaintiff in the conduct of the business of this voyage after Jan. 1, 1851, as distinguished from services rendered by Alsop & Co., was
117 substantive proof of the plaintiff's cause of action, and defendant's exceptions to the same (Record, p. 25), were properly overruled.

VII. There was no error in proving a clerical mistake in the heading of one of the accounts sales. (Record, p. 26, fol. 63.)

VIII. The objection to proof of the value of Foster's service is already met by the first point. *Supra.* (Record,
118 p. 26, fol. 65, and p. 31, fol. 77.)

IX. The exception taken to testimony of Mr. Riley (Record, p. 30, fol. 76), is misstated in the brief of plaintiff in error.

All the court allowed the plaintiff to show was what Foster in fact did after Jan. 1, 1851, and that the members of Alsop & Co. knew of and did not object to what he did. The court excluded any evidence of an understanding between Riley and Foster, and no such evidence was given.

119 X. The evidence of Foster's skill and experience was an essential part of the proof of the value of his services, and the objection to the same was properly overruled. (Record, p. 31, fol. 76.)

XI. Their objection to the exclusion of the record in the former suit is disposed of in the first point. *Supra.* (Record, p. 76. fols. 135, 136.)

XII. The question whether Goddard "had any reason
120 to suspect the competency of Mr. Riley, or of Alsop & Co., to manage his consignments," was wholly immaterial and properly excluded.

But, in his subsequent testimony, the witness answered the question, for he testified "that his reasons for engaging

Mr. Foster as his agent were because Alsop & Co. were all strangers to him, and he thought the presence of a good agent was next to a personal presence. That if he had not
had an agent at Valparaiso, he would have consigned his 121
goods to Alsop & Co. direct; but there would have been a disadvantage in consigning to Alsop & Co., direct, because, in that case, Alsop & Co.'s other constituents would have had the benefit of 'his knowledge of the trade, &c.;" that by having an agent, "he had the advantage also of protecting his goods from the competition of similar goods sent to them by other consignors." Thus he fully explained his motives in employing an agent.

XIII.—There was no error in excluding the evidence 122
offered by defendant that "shortly after the termination of Mr. Foster's agency, defendant sent out another agent equally competent with Mr. Foster, to whom he paid a salary of $4,000 per annum." (Record, p. 77, fol. 138.) It appeared by the previous testimony of the defendant that this new agent was Mr. Shirley Erving, the defendant's brother-in-law, and the question which this offer of evidence was proposed to make competent was, "What compensation he paid Mr. Erving as agent?" (Record, p. 77, fol.
138.) 123

It is an admitted fact in the case, that Mr. Erving arrived out November 1, 1851. (Record, p. 21.)

1. The evidence offered was inadmissible, because it raised a collateral issue of a particular contract *inter alios*, upon which the court and the jury could not be called on in this case to pass.

The value of the service of any particular person as agent depends on his natural ability, his skill and experience, and his fidelity, without taking into account many
more remote elements that might be considered. 124

Assuming that the offer of proof of comparative capacity of these two men went no further than to the proof of their respective natural ability and skill and experience, it will be seen at once that the admission of this line of proof opens the door to a very large amount of testimony, on both sides foreign to the issues between these parties.

2. This offer of evidence also presented the collateral 125 issue whether Goddard paid Erving the value of his service. This was a question the court and jury could not be called upon to try in this cause.

3. The subsequent testimony of the witness also obviated this objection.

The witness testified that in his opinion Foster's services "were worth $4,000 per annum." (Record, p. 77, fol. 138.) The jury had the full benefit of defendant's opinion as to the value of Foster's services and the question at issue.

126 XIV. The foregoing are all the errors assigned in the admission and exclusion of evidence.

EIGHTH POINT.

The judgment of the Circuit Court should be affirmed, with costs to the defendant in error.

WM. M. EVARTS,
Att'y and of Counsel for Def't in Error.